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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 43

CLYDE MALLORY LINES, APPELLANT,

vs.

THE STATE OF ALABAMA, EX REL. STATE DOCKS COMMISSION.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ALABAMA.

FILED MAY 6, 1935.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

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GLYDE MALLORY LINES, APPELLANT,

vs.

THE STATE OF ALABAMA, EX REL. STATE DOCKS COMMISSION.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ALABAMA.

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IN SUPREME COURT OF ALABAMA

CLYDE MALLORY LINES, Appellant,

vs.

STATE OF ALABAMA ex rel. STATE DOCKS COMMISSION, Appellee

PRÆCIPE FOR TRANSCRIPT OF RECORD

To Robert F. Ligon, Esq.,
Clerk of the Supreme Court of the State of Alabama:

Please incorporate in the transcript on the appeal to the Supreme Court of the United States, heretofore allowed; the entire and complete record of this cause, including this præcipe.

(Signed) Roscoe H. Hupper, (Signed) Alexis Tardy Gresham, Counsel for Appellant.

Service of a copy hereof acknowledged this, the 12th day of April, 1935.

(Signed) Gaillard & Gaillard, Counsel for Appellee.

[fol. 1] IN CIRCUIT COURT OF MOBILE COUNTY

STATE OF ALABAMA, ON THE RELATION OF STATE DOCKS COMMISSION, Plaintiff,

vs.

CLYDE MALLORY LINES, a Corporation, Defendant

COMPLAINT

Count 1. The plaintiff claims of the defendant the sum of Three Thousand Eight Hundred Twenty-five ($3,825.00) Dollars due from it by account, on the 29th day of September, 1932.

Count 2. The plaintiff claims of the defendant the further sum of Three Thousand Eight Hundred Twenty-five ($3,825.00) Dollars for work and labor done by the defendant

for the plaintiff on to-wit the 29th day of September 1932, at its request; which sums of money with the interest thereon are still unpaid.

Count 3. The plaintiff claims of the defendant the further sum of Three Thousand Eight Hundred Twenty-five ($3,825.00) Dollars, with interest, due by defendant to the plaintiff under the following state of facts:

The State Docks Commission, under the laws of the State of Alabama is vested with all the powers, duties and authority formerly vested in the State Harbor Commission, of Alabama, and such other powers, authority and duties as are conferred upon it by the laws of Alabama; that by virtue of the laws of Alabama, it is vested with the power and duty of complete supervision over the Harbor of Mobile, including the operation and control of all vessels moving in and out of said Port, or anchored therein, the regulation of all such vessels as to their station, berth, or their position in said Harbor and to keep said Harbor free from all obstructions.

Said Commission is further authorized to formulate and promulgate rules and regulations for the operation of said Harbor, and to make and collect reasonable rates of charges for all services rendered under authority vested in it by the State. And Plaintiff says that it (and said State Harbor Commission before it) performed the duties and exercised the power and authority vested in it under the laws of Alabama.

And plaintiff says that, acting under and by virtue of the [fol. 2] power and authority vested in it under the laws of Alabama, said State Docks Commission made and promulgated certain rules and regulations for the Harbor of Mobile, and certain fees and charges for services required of it in the supervision and control of said Harbor, for the benefit of vessels entering and being therein, and for the protection of the public, a true copy of said rules and regulations, fees and charges being hereto attached and made a part of this Count.

And plaintiff says that for services performed by State Docks Commission so required by law, and for services performed by it in the supervision, direction and control of the vessels under the management and control of the defendant, while in the Harbor of Mobile, up to and includ-

ing September 29, 1932, there is due said State Docks Commission from said defendant the sum of Three Thousand Eight Hundred Twenty-five ($3,825.00) Dollars.

And plaintiff says that demand has been made on the defendant by said State Docks Commission for payment of said sum of money, but payment thereof has been refused and is now due and payable to said State Docks Commission by defendant company, with interest thereon.

Gaillard & Gaillard, Attorneys for Plaintiff.

EXHIBIT TO COMPLAINT

Rules and Regulations for the Port of Mobile, Alabama

Rule 1

Masters of vessels entering the Port of Mobile, must, on arriving in the river, rig in the jib-booms and other outriggers; cockbill their yards; and take their anchors in on deck when not in use. When permission is given by the Chief Wharfinger or Deputy, to allow a vessel to keep the jib-boom and other outriggers out, the vessel having such permission will be held responsible for all damage done to other vessels.

Rule 2

The arrival of all vessels in the Port of Mobile shall be immediately reported either by the Master or Ship's Agent to the Chief Wharfinger's Office.

[fol. 3]

Rule 3

The Chief Wharfinger is charged with the duty of selecting and changing anchorages for ships, with the movements of vessels into and out of ships or berths, and with all other ship movements that affect a fair joint use of the facilities of the Port, and his instructions will be obeyed accordingly.

Rule 4

All vessels mooring in the river either to receive or to discharge cargo or ballast, must be moored on a line parallel to the channel of the river. If more than one vessel is so moored in the same vicinity, they must be moored on the

same line. All such vessels must be moored at both ends with anchors sufficiently heavy to hold them on the line as specified above.

Rule 5

Lighters, barges, timber, rafts or similar floating objects placed alongside vessels, wharves, piling or dolphins must be placed so as to not unnecessarily obstruct navigable water and must be made fast securely at both ends to prevent swinging with the tides, and must display conspicuously, suitable lights at night.

Rule 6

No vessel in the channel shall be allowed to make fast a line ashore, except in emergency and then only for the shortest possible time.

Rule 7

No vessel will be allowed to receive or discharge cargo while anchored in the river below Cochrane Bridge without permission from the Chief Wharfinger.

Rule 8

Masters requiring anchor berths for the purpose of laying up their vessels will apply to the Chief Wharfinger who will designate a berth where the vessel can be anchored.

Rule 9

When vessels are ready to proceed down the channel and they find themselves blocked by other vessels to the extent that they cannot get under way the officer in charge must report the same to the Chief Wharfinger at once.

Rule 10

The maximum rate of speed of vessels through the water from Chickasaw Creek to the mouth of Mobile River shall [fol. 4] be as follows: All vessels of 500 tons gross and under, (Except launches) six miles per hour, and all vessels over 500 tons gross, four miles per hour.

Rule 11

When requested, the Chief Wharfinger will inform Masters of vessels as to the maximum draft to which vessel can be safely loaded for passage through the channel.

Rule 12

Vessels lying in slips at Dry Docks must not project out into the river beyond the Harbor Line.

Vessels lying in slips other than at Dry Docks must not project out into the river beyond the Harbor line unless the slip is shorter than the vessel, in which case the vessel must occupy the entire length of the slip.

Rule 13

Vessels, barges and boats must not be berthed, more than two abreast at marginal wharves, on ends of piers, or alongside piling placed on the Harbor Line.

Rule 14

The Officer in charge of a vessel lying alongside a marginal wharf or at the end of a pier must heave the anchors up into the hawse pipes. When impossible to heave anchors up into hawse pipes they must be taken up on deck.

Rule 15

When the Master of a vessel lying in the inner Harbor of Mobile desires to shift his vessel, he shall apply to the Chief Wharfinger for permission to shift such vessel and for the services of a deputy wharfinger or Pilot licensed and employed by the Alabama State Docks Commission to assist him in making the change. However, should the Master desire to shift his vessel without the assistance of a deputy wharfinger or Pilot licensed and employed by the Alabama State Docks Commission, the Chief Wharfinger is empowered to grant permission to the Master or some other duly licensed navigating officer selected by the master to make such shift, provided the Chief Wharfinger is of the opinion that such Master or navigating officer has sufficient knowledge of the local conditions in the inner harbor to enable him to safely make such shift without endangering other shipping.

Under no circumstances will a vessel shift or change its anchorage or mooring without the assistance of a deputy [fol. 5] wharfinger or pilot licensed and employed by the State Docks Commission unless the Chief Wharfinger has authorized such movement to be made by the Master or some other duly licensed navigating officer.

Rule 16

The Inner Harbor of Mobile comprises that portion of Mobile Bay lying north of an East and West line drawn through Beacon 40, and that part of all tributary streams flowing into such harbor in which the tide ebbs and flows.

Rule 17

Section 1. No manufacturing or repair plant, no steamship, oil tanker, barge, or any other vessel shall, within the waters of the harbor of Mobile subject to the jurisdiction of the State Docks Commission, cast, discharge, or suffer to flow into and upon the waters of such harbor any oil or oily mixtures having an oil content greater than .05 of 1 per cent, or any other oily mixtures of a character that would cause an oil film on the surface of the water that would be visible to the naked eye in daylight in clear water.

Section 2. No vessel or craft of any description carrying fuel oil, crude oil or diesel oil in bulk as cargo or as fuel for boilers or engines, shall pump bilges containing any oil or oily mixtures of the character described in Section 1 hereof, into the waters of Mobile harbor within the jurisdiction of the Commission.

Section 3. The Pilot boarding any vessel entering Mobile Bay shall immediately serve the Master of such vessel a printed copy of these regulations; and all seagoing vessels, other than war vessels, carrying crude oil, fuel oil or diesel oil in bulk as cargo, or as fuel for boilers or engines, shall be boarded immediately, or as soon thereafter as practicable, upon arrival at wharf or anchorage within the harbor of Mobile, by a Representative of the State Docks Commission, who shall serve the Master (unless this has already been done by Pilot bringing ship in) and Chief Engineer of such vessel with a printed copy of these regulations, and shall with wire and lead seal bearing the impression "SDC" (wire to be not heavier than 22 gauge), seal all valves and suctions of such vessels as follows:

(a) Seal the overboard discharge valve from all fuel oil service pumps.

(b) If the fuel oil transfer pump has an overboard discharge line, this overboard discharge valve is to be sealed.

[fol. 6] (c) The bilge discharge valves for all bilge, lines, viz, cargo, engine and fireroom, to be sealed.

(d) In sealing valves, wire will be passed through valve wheel, thence through the yoke of the valve bonnet, back through the valve wheel, drawn taut and sealed with lead impression seal in such manner as to prevent the valve being opened without breaking the seal.

(e) Chief Engineers of such vessels will be held responsible and accountable for seeing that seals so affixed are held intact and unbroken so long as the vessel remains within the jurisdiction of the State Docks Commission.

(f) Provided, that nothing in these regulations is to be construed as prohibiting the breaking of such seals and the use of bilge or other pumps on vessels in Mobile Harbor in case of fire, accident, or other emergency where the safety of the vessel, crew or cargo is concerned. In the event of such emergency necessitating breaking any seals, a written report over the signature of the Master and Chief Engineer is to be submitted, within twenty-four hours thereafter, to the Chief Wharfinger, covering the circumstances in detail. The Chief Wharfinger will cause the valves opened to be closed and resealed as soon thereafter as circumstances will permit without jeopardy to the vessel, crew or cargo, and will report to the General Manager State Docks Commission the circumstances that caused the breaking of such seal or seals.

Section 4. All vessels before loading or discharging crude oil, fuel oil or diesel oil as cargo or bunkers, will see that all hose through which such oil is to flow, is in good condition, and that connections are oil tight; also cause all scuppers to be closed with wooden plugs packed with burlap, burlap and cement, or similar material, in such manner as to prevent any oil, in case of accident, flowing into Mobile harbor. Masters and Chief Engineers of such vessels will be held jointly responsible and accountable for compliance with this regulation.

Section 5. Where, in the process of dry-docking a vessel, it is necessary to remove from the bunkers mixtures containing more than .05 of 1 per cent of oil content, a special provision shall be made for a place outside of the waters of Mobile harbor into which such material is to be pumped.

The method provided for preventing the above oily mixture from getting into the waters of Mobile harbor shall, before being employed, be approved by the State Docks Commission.

[fol. 7] Section 6. Ships bringing oil cargoes into the port and pumping the same from their holds into tanks must submit to the State Docks Commission for approval the means adopted by them for preventing discharge of oil into the waters of the harbor of Mobile.

Harbor Fees

For the Port of Mobile prescribed by the State Docks Commission.

Tugs engaged in coastwise towing, per trip	$2.50
Vessels under 500 tons making weekly trips	2.50
Vessels under 500 tons	5.00
Vessels 500 tons and over	7.50
Shifting vesels in the harbor, under 1,000 tons	5.00
Shifting vessels in harbor, 1,000 tons and over	10.00
Shifting vessels to or from Twelve Mile Island	20.00
Shifting vessels to or from Chickasaw Creek (inside L. & N. Bridge)	15.00
Mooring vessels—under 1,000 tons	5.00
Mooring vessels—1,000 tons or over	10.00

Penalties

Prescribed by Section 18 of the State Docks Commission Act, approved January 17th, 1927:

Section 18 * * * Any person, firm, association, or corporation violating any of the rules and regulations so established shall be guilty of a misdemeanor and for each offense shall be subjected to a fine of not exceeding five hundred ($500.00) and may also be imprisoned in the County jail or sentenced to hard labor for the county for not more than six months. * * *

Issued 4th day of February, 1933.

In Circuit Court of Mobile County

Motion for Leave to Amend Complaint—Filed April 14, 1933

Plaintiff moves the Court for leave to amend its complaint by making the caption thereof read as follows:

State of Alabama, on the Relation of State Docks Commission, Plaintiff,

vs.

Clyde Mallory Lines, a Corporation Under the Laws of the State of Maine, as Successor by Consolidation therewith to Mallory Steamship Company, a Corporation, Defendant

also to amend the third count thereof by striking out the [fol. 8] word "defendant" in the 28th line of page two of the complaint, and inserting in lieu thereof the words "the said Mallory Steamship Company".

Gaillard & Gaillard, Attorneys for Plaintiff.

We accept notice of the filing of the above motion this 13th day of April, 1933.

Pillans, Cowley & Gresham, Attorneys for Defendant.

[File endorsement omitted.]

In Circuit Court of Mobile County

Order Granting Motion to Amend Complaint—April 22, 1933

This day in open Court came the parties by their Attorneys, and plaintiff's motion filed April 14th, 1933, for leave to amend complaint, coming on to be heard and being argued by counsel and understood by the Court; It is ordered and adjudged by the Court that plaintiff's said Motion filed April 14th, 1933, for leave to amend complaint, be and the same is hereby granted.

IN CIRCUIT COURT OF MOBILE COUNTY

DEMURRERS TO COUNT 3—Filed April 17, 1933

Defendant demurs to Count 3 of plaintiff's complaint upon the following grounds, separately and severally:

1. Said count does not state a cause of action.

2. The allegation in said count that there is due plaintiff from defendant the sum sued for, is alleged but as a conclusion of the pleader; and the facts showing that indebtedness do not appear.

3. Said count fails to show how or wherein plaintiff performed any services to vessels under the management or control of the defendant, whereby plaintiff is entitled to recover of the defendant, or of the Mallory Steamship Company, compensation for such services.

4. Said count fails to show any contract or agreement, express or implied, on the part of the defendant, or of the Mallory Steamship Company, to pay plaintiff the amount sued for, or any part thereof.

5. Said count fails to allege what the alleged services performed by plaintiff were or in what such services consisted.

6. For aught that appears, no services were rendered defendant or the Mallory Steamship Company, by plaintiff for which there appears in law liability from the defendant to the plaintiff.

[fol. 9] 7. The allegations of said count as to the services performed by plaintiff are vague, indefinite and uncertain.

8. It is not made to appear that the alleged services claimed to have been performed by the plaintiff, were done or performed at the instance or request of the defendant or of the Mallory Steamship Company.

9. It is not made to appear that the fees claimed in said count, or any part thereof, were for services actually rendered to the particular vessels alleged to be under the management and control of the defendant or of the Mallory Steamship Company, nor does it appear what these services were or wherein they consisted.

10. Said count fails to allege with sufficient certainty who or what the vessels were which it is alleged were under the management and control of the defendant or of the Mallory Steamship Company, nor does the tonnage of said vessels, or any one or more of them, appear from the allegations of said count.

11. For aught that appears from the allegations of said count, the fees claimed therein were equally chargeable whether any services to the particular vessel or vessels were required to be rendered by the State Docks Commission or not.

12. It is not made to appear that the amount sued for in said count represents actual services rendered by plaintiff or the State Docks Commission to any vessel or vessels owned or operated by the defendant or by the Mallory Steamship Company, or for which such services rendered thereby the defendant or the Mallory Steamship Company might be otherwise legally liable.

13. Because, from aught that appears from said count, the sum sued for is a duty on tonnage attempted to be laid in violation of Article I, Section 10, Paragraph 3, of the Constitution of the United States, providing: "No State shall, without the consent of Congress, lay any duty of tonnage."

14. It affirmatively appears from said count that plaintiff sues to recover of this defendant a tonnage duty which violates the Constitution of the United States, Article I, Section 10, Paragraph 3, providing: "No State shall, without the consent of Congress, lay any duty of tonnage."

15. Because, for aught that appears from the allega- [fol. 10] tions of said count, the sum claimed is a tax on commerce with foreign nations and among the several States, and, therefore, a violation of the Constitution of the United States, Article I., Section 8, Paragraphs 1 and 3, providing: "The Congress shall have power:— to regulate commerce with foreign nations, and among the several States."

16. It affirmatively appears from said count that the plaintiff sues to recover the amount of a tax or license attempted to be laid in violation of the Constitution of the

United States, Article I, Section 8, Paragraphs 1 and 3, providing: "The Congress shall have power:— to regulate commerce with foreign nations, and among the several States."

Pillans, Cowley & Gresham, Attorneys for Clyde-Mallory Lines.

[File endorsement omitted]

IN CIRCUIT COURT OF MOBILE COUNTY

ADDITIONAL DEMURRERS TO COUNT 3—Filed April 22, 1933

Defendant demurs to count 3 of plaintiff's complaint upon the following and additional grounds, separately and severally:

17. Because, for aught that appears from the allegations of said count, the sum claimed is an impost or duty attempted to be levied in violation of the provisions of the Constitution of the United States, Article 1, Section 10, Paragraph 2, providing:

"No state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the congress."

18. It affirmatively appears from said count that plaintiff sues to recover the amount of an impost or duty, attempted to be levied in violation of the Constitution of the United States, Article 1, Section 10, Paragraph 2, providing:

"No state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the congress."

[fol. 11] 19. For aught that appears from the allegations of said count, the sum sued for is a tax, duty, impost or toll, attempted to be levied in violation of the compact between the State of Alabama and the United States, providing:

"That all navigable waters within the state shall forever remain public highways, free to the citizens of said state and of the United States, without any tax, duty, impost or toll therefor imposed by the said state."

20. It affirmatively appears from said count that the plaintiff sues to recover the amount of a tax, duty, impost or toll, attempted to be levied in violation of the compact between the State of Alabama and the United States, providing:

"That all navigable waters within the state shall forever remain public highways, free to the citizens of said state and of the United States, without any tax, duty, impost or toll therefor imposed by the said state."

Pillans, Cowley & Gresham, Attorneys for the Defendant.

[File endorsement omitted]

IN CIRCUIT COURT OF MOBILE COUNTY

ORDER OVERRULING DEMURRERS TO COUNT #3—November 1, 1933

This day in open Court came the parties by their attorneys, and defendant's demurrers filed April 17th, 1933 to count #3, of the complaint, coming on to be heard, and being argued by counsel, and submitted to the Court, and after careful consideration by the Court: It is, ordered and adjudged by the Court that the defendant's said demurrers filed April 17th, 1933 to count #3 of the complaint, be and same are hereby over-ruled.

IN CIRCUIT COURT OF MOBILE COUNTY

ORDER OVERRULING ADDITIONAL DEMURRERS TO COUNT #3—November 1, 1933

This day in open Court came the parties by their attorneys, and defendant's additional demurrers filed April 22nd,

1933 to count #3 of the complaint, coming on to be heard and having been heretofore argued by counsel and submitted to the Court, after careful consideration by the Court; [fol. 12] It is ordered and adjudged by the Court that the defendant's said additional demurrers filed April 22nd, 1933 to count #3 of the complaint, be and they are hereby over-ruled.

In Circuit Court of Mobile County

Amendment to Complaint—Filed April 22, 1933

Plaintiff, by leave of Court, amends its complaint by making its caption read as follows:

State of Alabama, on the Relation of State Docks Commission, Plaintiff,

vs.

Clyde Mallory Lines, a Corporation, Under the Laws of the State of Maine, as Successor by Consolidation Therewith to Mallory Steamship Company, a Corporation, Defendant,

and also amends the third count of said complaint by striking out the word "defendant" in the 28th line of page two of the complaint and inserting in lieu thereof the words "the said Mallory Steamship Company."

Gaillard & Gaillard, Attorneys for Plaintiff.

[File endorsement omitted]

In Circuit Court of Mobile County

Motion for Bill of Particulars—Filed May 5, 1933

Defendant moves the Court to enter an order requiring plaintiff to furnish defendant a bill of particulars or a list of the items composing the account for which this suit is brought.

Pillans, Cowley & Gresham, Attorneys for the Defendant.

[File endorsement omitted]

IN CIRCUIT COURT OF MOBILE COUNTY

ORDER GRANTING MOTION FOR BILL OF PARTICULARS—May 13, 1933

This day in open Court came the parties by their attorneys, and defendant's motion filed May 5th, 1933, for a bill of particulars, coming on to be heard and being argued by counsel and understood by the Court; It is ordered and adjudged by the Court that the defendant's said motion filed May 5th, 1933, for a bill of particulars be and the same is hereby granted.

[fol. 13] IN CIRCUIT COURT OF MOBILE COUNTY

MOTION FOR LEAVE TO AMEND COMPLAINT—Filed Nov. 2, 1933

The plaintiff moves the Court for leave to amend its Complaint as follows:

Amend next to last paragraph of the third count by inserting the words "from March 3rd, 1924" immediately before the words "up to and including September 29th, 1932".

Gaillard & Gaillard.

We accept service of notice of the above motion this 2nd day of November, 1933.

Pillans, Cowley & Gresham, Attorneys for defendant.

[File endorsement omitted.]

IN CIRCUIT COURT OF MOBILE COUNTY

ORDER GRANTING MOTION TO AMEND COMPLAINT, NOVEMBER 4, 1933

This day in open Court came the parties by their attorneys, and plaintiff's motion filed November 2nd, 1933, for leave to amend complaint, coming on to be heard and being argued by counsel and understood by the Court; It is ordered and adjudged by the Court that plaintiff's said motion filed November 2nd, 1933 for leave to amend complaint, be and the same is hereby granted.

IN CIRCUIT COURT OF MOBILE COUNTY

AMENDMENT TO COMPLAINT—Filed Nov. 4, 1933

By leave of Court first granted, plaintiff amends the third paragraph of its Complaint as follows:

Amend next to last paragraph of the third count by inserting the words "from March 3rd, 1924" immediately before the words "up to and including September 29th, 1932".

Gaillard & Gaillard, Attys. for Plaintiff.

[File endorsement omitted.]

IN CIRCUIT COURT OF MOBILE COUNTY

DEMURRERS TO COUNT 3 AS AMENDED—Filed Dec. 6, 1933

Defendant demurs to count 3 of plaintiff's complaint as last amended, namely, as amended on, to-wit, November 4, 1933, and assigns separately and severally each and every ground of demurrer from 1 to 16, both inclusive, of defend- [fol. 14] ant's demurrers filed, to-wit, April 17, 1933; and each and every ground of demurrer numbered from 17 to 20, both inclusive, of defendant's demurrers filed, to-wit, April 22, 1933, to said count 3 as so last amended; and defendant further demurs to said count 3 as last amended on the following and additional grounds, separately and severally, that is to say:

21. Because it is not made to appear by said count that the State Docks Commission is authorized or empowered by law to lay and collect the fees or charges sought to be recovered in said count 3 of the complaint as last amended.

22. It is not made to appear that Sections 2427 to 2517, inclusive, of the Code of Alabama, of 1923 authorize and empower the State Docks Commission to lay and collect the fees or charges sought to be recovered in said count 3 as last amended.

23. It is not made to appear that under the Act of the Legislature of Alabama of January 17, 1927 (General Acts of Alabama, 1927, pp. 1-14, inclusive), the State Docks Commission is authorized and empowered to fix and collect

the fees or charges sought to be recovered in said count 3 of the complaint as last amended.

Pillans, Cowley & Gresham, Attorneys for the Defendant.

[File endorsement omitted.]

IN CIRCUIT COURT OF MOBILE COUNTY

ORDER OVERRULING DEMURRERS TO COUNT 3 AS AMENDED—December 18, 1933

This day in open Court came the parties by their attorneys, and defendant's demurrers filed December 6th, 1933, to count #3 as last amended, coming on to be heard, and having been heretofore argued by counsel and submitted to the Court, and after careful consideration by the Court; It is ordered and adjudged by the Court that the defendant's said demurrers filed December 6th, 1933, to count #3 as last amended be and they are hereby overruled.

IN CIRCUIT COURT OF MOBILE COUNTY

PLEAS TO COMPLAINT AS AMENDED—Filed Dec. 19, 1933

Defendant pleads each of the following pleas to each count of plaintiff's complaint as last amended:

1. Defendant pleads in short, by consent, the general issue.

[fol. 15] 2. The material allegations of the complaint are untrue.

3. The cause of action declared on in said count is barred by the statute of limitations of five years.

4. The cause of action declared on in said count is barred by the statute of limitations of three years.

5. The cause of action declared on in said count is barred by the statute of limitations of six years.

6. The sum of money sought to be recovered in said count represents the amount of a duty on tonnage, attempted to be laid and recovered of this defendant in violation of that portion of Article I, Section 10, of the Constitution of the United States, providing:

"No state shall, without the consent of congress, lay any duty of tonnage."

7. The sum of money sought to be recovered in said count represents the amount of a tax or license attempted to be laid and recovered of this defendant in violation of that portion of Article I, Section 8, of the Constitution of the United States, providing:

"The congress shall have power to regulate commerce with foreign nations and among the several states."

8. The sum of money sought to be recovered in said count represents the amount of a tax, duty, impost or toll, attempted to be laid and recovered of this defendant in violation of that portion of the compact between the State of Alabama and the United States, providing:

"• • • that all navigable waters within said state shall forever remain public highways, free to the citizens of said state and of the United States, without any tax, duty, impost or toll therefor, imposed by the said state."

Pillans, Cowley & Gresham, Attorneys for the Defendant.

[File endorsement omitted.]

IN CIRCUIT COURT OF MOBILE COUNTY

JOINDER ON PLEAS—Filed Jan. 3, 1934

Comes the plaintiff and joins issue on the pleas filed by the defendant in the above stated case.

Gaillard & Gaillard, Plaintiff's Attorneys.

[File endorsement omitted.]

[fol. 16] IN CIRCUIT COURT OF MOBILE COUNTY

MOTION FOR LEAVE TO FILE AND PLEA No. 9—Filed Feb. 3, 1934

Defendant moves the Court that it is given leave to file to each count of the plaintiff's complaint as last amended, the following further and additional plea, numbered 9, in words and figures as follows:

9. The sum of money sought to be recovered in said count represents the amount of a tax attempted to be laid and recovered in violation of that portion of Section 211 of the Constitution of Alabama, providing:

"All taxes levied on property in this State shall be assessed in exact proportion to the value of such property • • •"

Pillans, Cowley & Gresham, Attorneys for Defendant.

[File endorsement omitted.]

IN CIRCUIT COURT OF MOBILE COUNTY

ORDER GRANTING MOTION TO FILE PLEA No. 9—February 10, 1934

This day in open Court came the parties by their attorneys, and defendant's motion filed February 3rd, 1934 for leave to file plea 9, coming on to be heard and being argued by counsel and understood by the Court: It is, therefore, ordered and adjudged by the Court that defendant's said motion filed February 3rd, 1934 for leave to file plea 9, be and same is hereby granted.

IN CIRCUIT COURT OF MOBILE COUNTY

REPLICATION TO PLEA No. 9—Filed Feb. 20, 1934

Comes the plaintiff and for replication to the 9th plea pleaded by the defendant says the plaintiff joins issue on said plea.

Gaillard & Gaillard, Attorneys for Plaintiff.

[File endorsement omitted.]

IN CIRCUIT COURT OF MOBILE COUNTY

JUDGMENT BY COURT FOR PLAINTIFF FOR $2,190.00 AND DEFENDANT EXCEPTS—April 12, 1934

This cause having been regularly set for trial on this day, came the parties by their attorneys, and an issue being joined between the parties, and no trial by jury having been demanded by either party, this cause is tried by the Court without the intervention of a jury, and the Court [fol. 17] after hearing the evidence renders judgment for plaintiff, and against the defendant for the sum of $2190.00.

It is, therefore, ordered and adjudged by the Court that plaintiff do have and recover of the defendant the sum of Two Thousand One Hundred Ninety and no/100 dollars, the amount of damages as so assessed by the Court, besides all other costs in this cause created, for recovery of which, let execution issue.

To which ruling of the Court the defendant excepts.

IN CIRCUIT COURT OF MOBILE COUNTY

Bill of Exceptions—Filed June 22, 1934

Be It Known, That on, to-wit, April 12, 1934, a day of a regular term of said Court, on the trial of the above styled cause, which resulted in a judgment for the plaintiff, the following among other proceedings were had:

EXCERPT FROM STATEMENT OF CASE

In making to the Court the statement of the case, on behalf of the plaintiff, its attorney stated in part:

"This is a suit for harbor fees charged for cash vessel entering the port, amounting to $7.50 on each vessel; it is really a fee and not a specific service to each particular boat or ship, but a service generally rendered each and every ship and all shipping that should come into the port. It is a suit for fees due in the first instance by the Mallory Steamship Company for vessels brought into port under its management and control, and the Mallory Steamship Com-

pany was merged with the Clyde Mallory Lines under the name of Clyde Mallory Lines, both of the merging companies continuing in the merged company, and no question is raised about that."

It was agreed in open court by counsel for the respective parties that no question was raised as to the identity of the Clyde Mallory Lines with Mallory Steamship Company, the party against whom the suit was originally brought.

In stating the case for the defendant, its counsel stated that the defense made by the pleas was that the Legislature had not authorized the taxes or charges sued for, neither could it constitutionally do so; and further, pro tanto. the statute of limitations.

After statements made by respective counsel, the Court stated:

RULING ON DEMURRERS

"The effect of my ruling on the demurrers—I ruled that [fol. 18] the State Docks has power under its police authority to pass reasonable rules and regulations, and has the right to levy fines or fees to maintain the public service under its police powers. As to the limitation plea, I think the evidence as to the claim shown should be confined within five years preceding the date of the filing of the complaint. As to the question on the part of the State Docks colliding with the inhibition of the several sections of our Federal and State Constitution, I hold it is not violative of either of those provisions alleged or averred in the pleas. That is the ruling and effect on the demurrers, as the Court takes that position."

Thereupon counsel for the plaintiff argued to the Court that the demand sued for was not a "tax" and was, therefore, not a demand within paragraph 2 of Section 8945 of the Code of Alabama of 1923, and during the argument the Court stated in part:

"Have you a definition defining tax? A tax means a burden placed upon—is one definition. As fee is related to a special service for a profession, or in that field. A tax is simply a designated item laid down or placed upon, and it looks like it would certainly be a tax, as I understand the definition, Mr. Gaillard. I would be glad to hear any law to the contrary that would enlighten me upon the subject."

COLLOQUY

Thereupon there was further argument by counsel, during the course of which the following occurred in open court:

Defendant's counsel asked plaintiff's counsel:

"You admit that this amount, as you claim, is demanded of every ship, don't you, by governmental authority?"

Plaintiff's counsel answered: "On every ship over 500 tons in size, yes sir."

Defendant's counsel: "And that it is not for a specific service rendered?"

Plaintiff's counsel: "It is not for a service rendered to that ship only, but all ships."

Whereupon the Court stated that it was of opinion that the five year statute of limitations would apply.

[fol. 19] AGREEMENT AS TO CERTAIN FACTS

It was agreed between the parties that the following are facts: Within five years next preceding the bringing of this action, vessels owned, operated or managed by defendant made two hundred and ninety-two separate voyages from New York City to Mobile, Alabama, their arrivals at the latter port averaging four or five per month. On each voyage the vessel entered and berthed in the harbor of Mobile. On and after March 3, 1924, and prior to February 4, 1928, vessels owned, operated or managed by defendant made two hundred and eleven separate voyages from New York City to Mobile, Alabama, their arrivals at the latter port averaging four or five each month. On each voyage the vessel entered and berthed in the harbor of Mobile.

It was further agreed that this stipulation might be offered in evidence by plaintiff, subject to defendant's objections hereinafter stated.

Whereupon, plaintiff offered said stipulation in evidence, to which the defendant objected, because it had been neither shown nor offered to be shown that any service had been rendered to or requested for any vessel for which a charge may be made; and further and separately to that portion of the facts stipulated relating to entry of defendant's

vessels at any time prior to five years next preceding the bringing of this action, because as to any such vessel the claim is barred by the statute of limitations of five years; whereupon the Court overruled the defendant's objections to the entire stipulation, to which ruling the defendant then and there, in open court, duly excepted; but the Court sustained the defendant's objection to that portion of the stipulation as to any occurrence prior to five years next preceding the bringing of the action.

J. H. Bruce, plaintiff's witness, after having been first duly sworn, testified on direct examination as follows:

"My name is J. H. Bruce. I am secretary and treasurer of the State Docks Commission, and have been such since August 1931. I have the custody of the minutes of the Commission."

Thereupon plaintiff offered in evidence certified copy from the minutes of the State Docks Commission under date of February 25, 1924, marked "Plaintiff's Exhibit B", and which was in words and figures as follows:

[fol. 20] Plaintiff's Exhibit B—4/12/34—C. A. S.

Alabama State Docks Commission,

Mobile, Alabama

February 25th, 1924.

The regular monthly meeting of the State Docks Commission was held this day in the office of the Commission. Among other business transacted the following schedule of charges for Harbor Fees was adopted:

"General Sibert presented to the Commission for consideration, a schedule of charges to be collected by the State Docks Commission for Harbor Fees for the purpose of meeting the expense attendant upon the supervision of the Port and execution of the regulations and providing for the proper accommodation of vessels at this Port. Governor Henderson moved, seconded by Mr. Blair: To

adopt the schedule of charges of Harbor Fees, effective March 1st, 1924, as follows:

Tugs engaged in coastwise towing, per trip	$2.50
Vessels under 500 tons making weekly trips	2.50
Vessels under 500 tons	5.00
Vessels 500 tons and over	7.50
Shifting vessels in the harbor, 1,000 tons and over	10.00
Shifting vessels in the harbor, under 1,000 tons	5.00
Shifting vessels to or from Twelve Mile Island	20.00
Shifting vessels to or from Chickasaw Creek, inside L. & N. Bridge	15.00
Mooring vessels under 1,000 tons	5.00
Mooring vessels 1,000 tons or over	10.00"

I hereby certify that the above is a true and correct copy taken from the minutes of the State Docks Commission's meeting held on the day and date above written.

J. H. Bruce, Secretary-Treasurer. (Corporate Seal.)

Subscribed and sworn to before me, this the 30th day of Jan., 1934. Celia Gerhardt, Notary Public.

Thereupon the defendant objected to the plaintiff's offer on the ground that it had not been shown that any service had been rendered to the defendant's vessels, or any of them, for which a charge is authorized to be made; the Court overruled the objection, and the defendant then and there, in open court, duly excepted to the ruling and action of the Court.

[fol. 21] Thereupon plaintiff offered in evidence certified copy of the minutes of the State Docks Commission under date of March 5, 1924, which was marked "Plaintiff's Exhibit C", and which was in words and figures as follows:

PLAINTIFF'S EXHIBIT "C"

Alabama State Docks Commission,

Mobile, Alabama

March 5th, 1924.

The regular monthly meeting of the State Docks Commission was held this day in the office of the Commission, among other business transacted the following was adopted:

"The Chairman presented to the Commission the rules and regulations for the Port of Mobile, which are as follows:

Rule 1

Masters of sailing vessels entering the Port of Mobile, must, on arriving in the river, rig in the jib-booms and other outriggers; cockbill their yards; and take their anchors in on deck when not in use. When permission is given by the Chief Wharfinger or Deputy, to allow a vessel to keep the jib-boom and other outriggers out, the vessel having such permission will be held responsible for all damage done to other vessels.

Rule 2

The arrival of all vessels into the Port of Mobile shall be immediately reported either by the Master or Ship Agent to the Chief Wharfinger's Office and to the State Docks Commission Office.

Rule 3

The Chief Wharfinger is charged with the duty of selecting and changing anchorages for ships, with the movements of vessels into and out of slips or berths, and with all other ship movements that affect a fair joint use of the facilities of the Port, and his instructions will be obeyed accordingly.

Rule 4

All vessels mooring in the river above One Mile Creek, either to receive or to discharge cargo or ballast, must be moored on a line parallel to the channel of the river. If more than one vessel is so moored in the same vicinity, they must be moored on the same line.

Rule 5

All vessels loading or discharging in the stream are [fol. 22] required to moor at both ends with anchors sufficiently heavy to hold them on the line as specified in Rule 4.

PLAINTIFF- EXHIBIT C—4/12/34—C. A. S.

Sheet #1.

Rule 6

Lighters, barges, timber, rafts, etc., placed alongside vessels, wharves, piling, etc., must be placed so as to give free passageway up and down the river to all water craft, and must be made fast securely at both ends to prevent swinging with the tides. All such crafts shall display conspicuously, suitable lights at night.

Rule 7

No vessel in the channel shall be allowed to make fast a line ashore, except in emergency and then only for the shortest possible time.

Rule 8

No vessel will be allowed to receive or discharge cargo in the river below One Mile Creek without written permission from the Chief Wharfinger.

Rule 9

Masters requiring anchor berths for the purpose of laying up their vessels will apply to the Chief Wharfinger who will designate a berth where the vessel can be anchored.

Rule 10

When vessels are ready to proceed down the channel and they find themselves blocked by other vessels to the extent that they cannot get under way, the officer in charge must report the same to the Chief Wharfinger at once.

Rule 11

Vessels of all descriptions desiring to discharge any kind of material, such as garbage, ashes or rubbish of any kind into the waters of, or any of the water courses emptying into Mobile Bay, must obtain a permit from the United States Engineers' Office.

Sheet #2.

Rule 12

Vessels are not allowed to anchor in the river below Madison Street.

Rule 13

The maximum rate of speed of vessels from Chickasaw [fol. 23] Creek to the mouth of Mobile River shall be as follows: All vessels of 500 tons gross and under, (Except launches) six miles per hour, and all vessels over 500 tons gross, four miles per hour.

Rule 14

The Chief Wharfinger will inform Masters of vessels as to the maximum draft to which vessels can be safely loaded for passage through the channel.

Rule 15

The discharging of oil into the waters of Mobile River is prohibited both by the State Docks Commission and the City of Mobile.

Governor Henderson moved "the approval and adoption of the rules and regulations for the Port of Mobile and that booklets in such number as the Chairman deems advisable, be published", seconded by Mr. Blair and unanimously adopted.

I hereby certify that the foregoing covered by sheets #1, #2, and #3, is a true and correct copy taken from the minutes of the State Docks Commission meeting held on March 5th, 1924.

J. H. Bruce, Secretary-Treasurer. (Corporate Seal.)

Subscribed and sworn to before me, this the 30th day of January, 1934.

Celia Gerhardt, Notary Public.

Sheet #3

Thereupon defendant objected to the plaintiff's offer, as being irrelevant, incompetent and immaterial, and on the further ground that it had not been shown or offered to be shown that there was any service rendered to any of defendant's vessels, or that any service or services was or were requested to be rendered to them; the Court overruled the defendant's objection, and the defendant then and there, in open Court, excepted to the ruling and action of the Court.

Whereupon the plaintiff offered in evidence certified copy of the minutes of the State Docks Commission dated February 11, 1928, which was marked "Plaintiff's Exhibit D", and which was in words and figures as follows:

[fol. 24] Plaintiff's Exhibit D—4/12/34—C. A. S.

Alabama State Docks Commission

Mobile, Alabama

February 11th, 1928.

The regular monthly meeting of the State Docks Commission was held this day in the office of the Commission. Among other business transacted the following was adopted:

"The Port rules, Regulations and Fees governing the Port of Mobile were unanimously adopted. (Copy of rules attached.)"

I hereby certify that the above is a true and correct copy taken from the minutes of the State Docks Commission meeting held on the day and date above written.

J. H. Bruce, Secretary-Treasurer.

Subscribed and sworn to before me, this 30th day of Jan. 1934.

Celia Gerhardt, Notary Public.

Rules, Regulations and Fees Prescribed by the State Docks Commission

For Pilots and Pilotage and for the Operation of the Port and Harbor of Mobile, Ala.

Resolved, That the State Docks Commission, in virtue of and acting under the police and other powers of the State with which it is invested by Section 93 of the Constitution of Alabama and the provisions of Sections 3, 6 and 18 of the State Docks Commission Act, approved January 17, 1927, which sections or portions thereof are set forth below:

Section 3. The jurisdiction of the Commission in any harbor or seaport within the State shall extend over the waters and shores of such harbor or seaport and over that

part of all tributary streams flowing into such harbor or seaport in which the tide ebbs and flows, and shall extend to the outer edge of the outer bar at such harbor or seaport.

Section 6. * * * The State Docks Commission is [fol. 25] hereby authorized within the power of the State to establish and enforce rules and regulations concerning pilotage and to fix the pilotage fees for piloting vessels across the outer bar and into any harbor or seaport and between points in such harbor or seaport.

Section 18. Said Commission is hereby authorized to formulate and promulgate rules and regulations for the operation of any seaport or harbor within the State * * *, hereby adopts, issues, promulgates and declares in force and effect the following rules and regulations:

Rule 1

Excepting from the hereinafter prescribed requirements as to pilots and pilotage all vessels described in Alabama Code (1923) Section 2518, exempting certain classes of vessels from the duty to take a pilot or to pay pilotage, and excepting fishing smacks, and excepting as aforesaid all vessels with respect to which the State of Alabama cannot, because of the laws, rules and regulations of the United States, exact the taking of a pilot and the payment of pilotage—all other vessels entering or leaving the Bay of Mobile, shall be conducted or controlled by a pilot licensed by or under the authority of the State of Alabama. No vessel, for the conduct or control of which a pilot is required by Rule 1 hereinabove, shall be moved or navigated without a pilot in its service, if the services of a pilot are seasonably tendered or are seasonably available.

Rule 2

The master, owner or consignee of a ship or vessel served by a pilot licensed under the authority of the State of Alabama and subject to the requirement of Rule 1 hereinabove, shall pay the following rates on actual draft of water at the time of pilotage:

Vessels crossing the outer bar of Mobile Bay drawing not more than nine feet of water Two Dollars and Fifty Cents ($2.50) per foot; vessels drawing more than nine feet of water and less than eleven feet crossing said bar, Three

Dollars ($3.00) per foot; and not exceeding twelve feet of water, crossing said bar, Three Dollars and Twenty-five Cents ($3.25) per foot; vessels drawing twelve feet and not exceeding fourteen feet of water, crossing said bar, Three Dollars and Fifty Cents ($3.50) per foot; vessels drawing fourteen feet, and not exceeding twenty feet of water crossing said bar, Five Dollars ($5.00) per foot; vessels drawing more than twenty feet of water, crossing said bar, Six Dollars ($6.00) per foot.

[fol. 26]

When a pilot has brought a vessel into port, the fees therefor shall be paid before the departure of such vessel from port, or security given for the payment thereof and on failure to do so a pilot for such vessel may be refused.

No person not duly licensed as a pilot shall be entitled to demand or to receive any fee or compensation for service as a pilot.

Rule 3

It shall be the duty of every outer-bar pilot to deliver to the master of any and every vessel approaching the Bay or Harbor of Mobile as soon as he can board such vessel all letters which may be received for such delivery; provided the person who requires the delivery of such letters must pay or secure the payment of Twenty Dollars ($20.00) for such services unless the pilot making such delivery is engaged as a pilot for the vessel, in which latter event the master of the vessel shall pay Five Dollars ($5.00) for such service.

Rule 4

Where a vessel within the pilotage requirement of Rule 1, or the master of such vessel, declines the seasonably tendered services of a pilot and crosses the outer bar of Mobile Bay or enters the Harbor or Port of Mobile, the master of such vessel and the vessel is liable to pay the pilotage fees prescribed in Rule 2 hereinabove.

Rule 5

In order that a Pilot may be supplied without delay: The Master or Agent of a vessel in readiness to leave the port must notify the Chief Wharfinger at least two hours before the proposed time of sailing. In event that vessel is to sail during the night this notice must be given before 5:30 P. M.

Rule 6

If a pilot is detained or retained on board a vessel more than two hours after the time originally set for sailing, the wind and weather permitting her to go to sea, the master of the vessel shall pay for such detention or retention the sum of One Dollar ($1.00) for every hour or part of an hour thereof. Should the vessel's time of sailing be changed and pilot released the vessel or master thereof shall pay in addition to such retention fee a discharged fee of Five Dollars ($5.00).

Rule 7

When a vessel outward bound approaches the bar and in [fol. 27] the opinion of the Pilot on Board, weather conditions are such that he will not be able to leave the vessel outside, he will report these facts to the Master. The Pilot on Board will then signal to the Pilot Ship to take him off inside. The Pilot Ship will then lead the vessel, thus relieved of its Pilot out across the bar.

Reduction of Pilot Fees on Ships Entering Mobile for Repairs or Bunkering

By resolution passed April 23rd, 1927 the State Docks Commission provided that pilotage rates should be reduced one-half on all vessels entering the Port of Mobile for the sole purpose of being dry docked and repaired or for the sole purpose of bunkering.

Relation of Pilot to Master

The following Resolution was adopted by the Alabama State Docks Commission at its regular meeting December 3rd, 1927, and is published for the information and guidance of all concerned.

Whereas, in and by the State Docks Commission Act of 1927, approved January 17, 1927, the State Docks Commission of Alabama is authorized and empowered to establish and enforce rules and regulations concerning pilots and pilotage in and about the harbors and seaports within the jurisdiction of the State of Alabama; and

Whereas, the rule and regulation herein below made and established is essential to the government and operation

of vessels within the waters subject to the jurisdiction of the State Docks Commission of Alabama:

Now, therefore, be it resolved, that when a pilot licensed under the authority of the State Docks Commission of Alabama boards a vessel to assist in bringing it across the Bar, through the Bay, to an anchorage, or into or out of docks in Mobile River, such pilot shall report to the Master of the vessel for duty solely as an expert assistant to such Master, and shall perform such duties only, in connection with the navigation of the ship, as the Master of the vessel may assign him; and in no case shall such pilot displace or supersede, or assume to displace or supersede, the Master as the chief, superior officer in the control, navigation, or movement of the ship.

Rules and Regulations for The Port of Mobile, Alabama

[fol. 28] Rule 1

Masters of vessels entering the Port of Mobile, must, on arriving in the river, rig in the jib-booms and other outriggers; cockbill their yards; and take their anchors in on deck when not in use. When permission is given by the Chief Warfinger or Deputy, to allow a vessel to keep the jib-boom and other outriggers out, the vessel having such permission will be held responsible for all damage done to other vessels.

Rule 2

The arrival of all vessels in the Port of Mobile shall be immediately reported either by the Master or Ship's Agent to the Chief Wharfinger's Office.

Rule 3

The Chief Wharfinger is charged with the duty of selecting and changing anchorages for ships, with the movements of vessels into and out of slips or berths, and with all other ship movements that affect a fair joint use of the facilities of the Port, and his instructions will be obeyed accordingly.

Rule 4

All vessels mooring in the river either to receive or to discharge cargo or ballast, must be moored on a line parallel to the channel of the river. If more than one vessel is

so moored in the same vicinity, they must be moored on the same line. All such vessels must be moored at both ends with anchors sufficiently heavy to hold them on the line as specified above.

Rule 5

Lighters, barges, timber, rafts or similar floating objects placed alongside vessels, wharves, piling or dolphins must be placed so as to not unnecessarily obstruct navigable water and must be made fast securely at both ends to prevent swinging with the tides, and must display conspicuously, suitable lights at night.

Rule 6

No vessel in the channel shall be allowed to make fast a line ashore, except in emergency and then only for the shortest possible time.

Rule 7

No vessel shall be allowed to receive or discharge cargo while anchored in the river below Cochrane Bridge without Permission from the Chief Wharfinger.

[fol. 29]

Rule 8

Masters requiring anchor berths for the purpose of laying up their vessels will apply to the Chief Wharfinger who will designate a berth where the vessel can be anchored.

Rule 9

When vessels are ready to proceed down the channel and they find themselves blocked by other vessels to the extent that they cannot get under way the officer in charge must report the same to the Chief Wharfinger at once.

Rule 10

The maximum rate of speed of vessels through the water from Chickasaw Creek to the mouth of Mobile River shall be as follows:—All vessels of 500 tons gross and under, (Except launches) six miles per hour, and all vessels over 500 tons gross, four miles per hour.

Rule 11

When requested, the Chief Wharfinger will inform Masters of vessels as to the maximum draft to which vessels can be safely loaded for passage through the channel.

Rule 12

Vessels lying in slips at Dry Docks must not project out into the river beyond the Harbor Line.

Vessels lying in slips other than at Dry Docks must not project out into the river beyond the Harbor line unless the slip is shorter than the vessel, in which case the vessel must occupy the entire length of the slip.

Rule 13

Vessels, barges and boats must not be berthed, more than two abreast at marginal wharves, on ends of piers, or alongside piling placed on the Harbor Line.

Rule 14

The Officer in charge of a vessel lying alongside a marginal wharf or at the end of a pier must heave the anchors up into the hawse pipes. When impossible to heave anchors up into hawse pipes they must be taken up on deck.

Rule 15

When the Master of a vessel lying in the inner Harbor of Mobile desires to shift his vessel, he shall apply to the Chief Wharfinger for permission to shift such vessel and for the [fol. 30] services of a deputy wharfinger or Pilot licensed and employed by the Alabama State Docks Commission to assist him in making the change. However, should the Master desire to shift his vessel without the assistance of a deputy wharfinger or Pilot licensed and employed by the Alabama State Docks Commission, the Chief Wharfinger is empowered to grant permission to the Master or some other duly licensed navigating officer selected by the master, to make such shift, provided the Chief Wharfinger is of the opinion that such Master or navigating officer has sufficient knowledge of the local conditions in the inner harbor to enable him to safely make such shift without endangering other shipping.

Under no circumstances will a vessel shift or change its anchorage or mooring without the assistance of a deputy wharfinger or pilot licensed and employed by the State Docks Commission *under* the Chief Wharfinger has authorized such movement to be made by the Master or some other duly licensed navigating officer.

Rule 16

The Inner Harbor of Mobile comprises that portion of Mobile Bay lying north of an East and West line drawn through Beacon 40, and that part of all tributary streams flowing into such harbor in which the tide ebbs and flows.

Rule 17

Section 1. No manufacturing or repair plant, no steamship, oil tanker, barge, or any other vessel shall, within the waters of the Harbor of Mobile subject to the jurisdiction of the State Docks Commission, cast, discharge, or suffer to flow into and upon the waters of such harbor any oil or oily mixtures having an oil content greater than .05 of 1 per cent, or any other oily mixtures of a character that would cause an oil film on the surface of the water that would be visible to the naked eye in daylight in clear water.

Section 2. No vessel or craft of any description carrying fuel oil, crude oil or diesel oil in bulk as cargo or as fuel for boilers or engines, shall pump bilges containing any oil or oily mixtures of the character described in Section 1 hereof, into the waters of Mobile harbor within the jurisdiction of the Commission.

Section 3. The Pilot boarding any vessel entering Mobile Bay shall immediately serve the Master of such vessel a printed copy of these regulations; and all seagoing vessels, [fol. 31] other than war vessels, carrying crude oil, fuel oil or diesel oil in bulk as cargo, or as fuel for boilers or engines, shall be boarded immediately, or as soon thereafter as practicable, upon arrival at wharf or anchorage within the harbor of Mobile, by a Representative of the State Docks Commission, who shall serve the Master (unless this has already been done by Pilot bringing ship in) and Chief Engineer of such vessel with a printed copy of these regulations, and shall with wire and lead seal bearing the impres-

sion "SDC" (wire to be not heavier than 22 gauge), seal all valves and suctions of such vessels as follows:

(a) Seal the overboard discharge valve from all fuel oil service pumps.

(b) If the fuel oil transfer pump has an overboard discharge line, this overboard discharge valve is to be sealed.

(c) The bilge discharge valve for all bilge lines, viz, cargo, engine and fireroom, to be sealed.

(d) In sealing valves, wire will be passed through valve wheel, thence through the yoke of the valve bonnet, back through the valve wheel, drawn taut and sealed with lead impression seal in such manner as to prevent the valve being opened without breaking the seal.

(e) Chief Engineers of such vessels will be held responsible and accountable for seeing that seals so affixed are held intact and unbroken so long as the vessel remains within the jurisdiction of the State Docks Commission.

(f) Provided, that nothing in these regulations is to be construed as prohibiting the breaking of such seals and the use of bilge or other pumps on vessels in Mobile Harbor in case of fire, accident, or other emergency where the safety of the vessel, crew or cargo is concerned. In the event of such emergency necessitating breaking any seals, a written report over the signature of the Master and Chief Engineer, is to be submitted, within twenty-four hours thereafter, to the Chief Wharfinger, covering the circumstances in detail. The Chief Wharfinger will cause the valves opened to be closed and resealed as soon thereafter as circumstances will permit without jeopardy to the vessel, crew or cargo, and will report to the General Manager State Docks Commission the circumstances that caused the breaking of such seal or seals.

Section 4. All vessels before loading or discharging crude oil, fuel oil or diesel oil as cargo or bunkers, will see [fol. 32] that all hose through which such oil is to flow, is in good condition, and that connections are oil tight; also cause all scuppers to be closed with wooden plugs packed with burlap, burlap and cement, or similar material, in such manner as to prevent any oil, in case of accident, flowing into Mobile harbor. Masters and Chief Engineers of such

vesels will be held jointly responsible and accountable for compliance with this regulation.

Section 5. Where, in the process of dry-docking a vessel, it is necessary to remove from the bunkers mixtures containing more than .05 of 1 per cent of oil content, a special provision shall be made for a place outside of the waters of Mobile harbor into which such material is to be pumped. The method provided for preventing the above oily mixture from getting into the waters of Mobile harbor shall, before being employed, be approved by the State Docks Commission.

Section 6. Ships bringing oil cargoes into the port and pumping the same from their holds into tanks must submit to the State Docks Commission for approval the means adopted by them for preventing discharge of oil into the waters of the harbor of Mobile.

Harbor Fees

For the Port of Mobile Prescribed by the State Docks Commission.

Tugs engaged in coastwise towing per trip	$ 2.50
Vessels under 500 tons—making weekly trips	2.50
Vessels under 500 tons	5.00
Vessels 500 tons and over	7.50
Shifting vessels in the harbor, under 1000 tons	5.00
Shifting vessels in harbor, 1000 tons and over	10.00
Shifting vessels to or from Twelve Mile Island	20.00
Shifting vessels to or from Chickasaw Creek—(inside L. & N. Bridge)	15.00
Mooring vessels—under 1000 tons	5.00
Mooring vessels—1000 tons or over	10.00

Penalties

Prescribed by Section 18 of the State Docks Commission Act, approved January 17th, 1927

Section 18, * * * Any person, firm, association, or corporation violating any of the rules and regulations so established shall be guilty of a misdemeanor and for each offense shall be subjected to a fine of not exceeding five hundred ($500.00) and may also be imprisoned in the County

jail or sentenced to hard labor for the county for not more [fol. 33] than six months * * *.

Thereupon the defendant objected to the document offered by the plaintiff, as being irrelevant, incompetent and immaterial, and because it had not been shown nor offered to be shown that there was any service rendered to any of defendant's vessels, or that any service or services was or were requested to be rendered to them; the Court overruled the defendant's objection, and the defendant then and there, in open Court, duly excepted to the ruling and action of the Court.

Whereupon plaintiff offered in evidence the authority of the Governor of Alabama to bring the suit, dated September 13, 1932, which was in writing and marked "Plaintiff's Exhibit E", and which was in words and figures as follows:

PLAINTIFF'S EXHIBIT E—4/12/34—C. A. S.

Alabama
(Great Seal)

State of Alabama

Executive Department

Montgomery

Sept. 13, 1932.

State Docks Commission,
Mobile, Alabama.

GENTLEMEN:

I hereby approve the institution and prosecution to conclusion of suits against the Mallory Steamship Company and Gulf Barge and Towing Company for fees due the Alabama State Docks Commission.

Yours very truly, B. M. Miller, Governor.

The witness Bruce continued:

"I have continued to send invoices and statements to the Mallory Steamship Company for payment of the dues sued for in this case, and they have declined to pay."

C. H. SMITH, plaintiff's witness, after having been first duly sworn, testified on direct examination as follows:

"My name is C. H. Smith. I hold the position of harbormaster at the State Docks, prior to which time I was assistant harbormaster. Prior to that, I was a tugboat captain and captain on the bay boats, coming in and out of what is known as the harbor of Mobile. The inner harbor of Mobile [fol. 34] is supposed to be from a line drawn east and west of Beacon 40 and extends up as far as the tide ebbs and flows. Beacon 40 is about two miles below the mouth of the river."

The witness was thereupon requested to explain to the Court the contours of the harbor above Beacon 40, its shape and its formation, whereupon defendant objected to the question as being irrelevant, and because the physical dimensions of the harbor are not material to any issue in this cause; the Court overruled the objection, and the defendant then and there, in open Court, duly excepted to the ruling and action of the Court.

The witness answered:

"It is a narrow river and the immediate inner harbor runs up from the mouth of the river about four miles, averaging in width from about 700 to 1000 feet. Off the Alabama Dry Dock the river is about 700 feet wide, and at State Docks, Pier B, it is about 1023 feet. The Alabama Dry Dock is inside of the mouth of the river. The mouth of the river is about 850 feet wide."

The following question was thereupon propounded to the witness by plaintiff: "Where is the principal anchorage for vessels entering the harbor?"

The defendant objected to the question and to all testimony tending to show the physical outlines of the harbor of Mobile, on the ground that it is irrelevant and has no tendency to show any service rendered to any vessel of the defendant in this case, or to show the defendant is liable in any sum for any service; the Court overruled the objection and the defendant then and there in open court duly excepted to the ruling and action of the Court.

The witness answered:

"The principal anchorage for vessels entering the harbor is from Dauphin Street up to the old Government oil dock on the east side of the river, all of which is in the River of Mobile, which is within the limits of 700 to 1000 feet in width."

Thereupon the following question was propounded by the plaintiff to the witness:

"Explain to the Court, if you will, whether or not there are industries or improvements on both sides of the harbor from the mouth of the river up to and beyond the State Docks?"

The defendant objected to the question on the ground that it called for irrelevant testimony, and on the further [fol. 35] ground that it called for no testimony showing or tending to show any service rendered to any vessel of the defendant, nor to show that defendant is liable in any sum for any service. The Court overruled the objection, and the defendant then and there, in open court, duly excepted to the ruling and action of the Court.

The witness answered:

"On the east side of the river there is the Alabama Dry Docks and Henderson Docks, the Government Reservation, the Engineers Dock, Murnan Shipbuilding & Dry Dock Company, then Harrison Brothers. Harrison Brothers have ways and dry docks. Then come the Southern Dry Docks and the Coastal Petroleum Company and the old Government Oil Control Dock. On the west side, beginning at the south, there is G. M. & N. Dock No. 4, then the lighthouse dock, The Texas Oil Company, Turner Terminals, Todd Dry Dock & Shipbuilding Company, L. & N. coal dock, Radcliff's Sand & Gravel Company. At Eslava Street there is a fish and oyster dock, the L. & N. Wharf, M. & O. No. 1, Fruit Company's dock, the City Wharf, M. & O. No. 2. Then come M. & O. Docks 3, 4, 5, 6, 7 and 8, and which are all slips dug in. Then the State Docks, Piers A, B and C, then the Coastal Petroleum's ferry landing, above that the Pure Oil Dock, State Coal Tipple and the Gulf Refining Company."

The witness continued:

"Vessels coming in use these places. The stated width of the river is its width from bank to bank, the navigable channel being 500 feet wide from the mouth of the river just above the State Docks, where it narrows to 300 feet wide up to Cochrane Bridge. It is approximately four and a quarter miles from the G. M. & N. Dock at the south to the Gulf Refining Company on the north, to which I refer. At some of these places they have slips for vessels to enter and load

and unload. The vessels have to come up according to weather conditions. When the vessels leave these slips they are thence carried into the narrow or dredged channel. All of the vessels that ever come in under the management and control of the Mallory Steamship Company or Clyde Mallory Lines exceed 500 tons capacity. Ships that come into the Port of Mobile vary in size from 150 feet to 550 feet in length. A vessel of these dimensions coming out of any slip either from east or west would have to have a clear way into the dredged channel, Supervision of the anchorage of vessels, barges and rafts, is mine as harbor-[fol. 36] master, and I have two deputies."

Thereupon the following question was propounded to the witness:

"State to the Court whether or not there is danger from collision from vessels going up and down the channel, entering and leaving the channel, and from vessels that might be coming out of slips or from alongside wharfs swinging into the channel."

The defendant objected to the question as calling for irrelevant, incompetent and immaterial testimony, and as in nowise tending to prove or disprove any of the issues in this case. The Court overruled the objection, and the defendant then and there, in open Court, duly excepted to the ruling and action of the Court.

The witness answered:

"Well, there is danger in this way,—there might be a 530 or 540 foot ship anchored in the river. Of course, the customary anchorage is on the east side of the river against the bank, because they have to have room to swing, but then there might be a high tide, which with the wind might swing the ship across the river, and if there was not some rules to make those ships anchor and run a line ashore, they could anchor at will, and they would swing around with the tide and wind and close the channel, and we have to have some method or rules by which to require those vessels to anchor properly and keep the channel clear."

Thereupon plaintiff propounded the following question to the witness:

"Would there not be like danger if the ship were anchored firm and fast at any point that might be in front of a slip

or wharf from which one of these vessels were going to come out?"

The defendant objected to the question, as calling for irrelevant, incompetent and immaterial testimony, and as in nowise tending to prove or disprove any of the issues in this case. The Court overruled the objection, and the defendant then and there, in open Court, duly excepted to the ruling and action of the Court.

The witness answered: "Yes sir."

Thereupon the plaintiff propounded the following question to the witness:

"Then is it or not necessary that there be supervision over the port so as to avoid collisions of that kind and to [fol. 37] see that vessels coming into the port do not endanger other shipping by discharging oil or gas on the waters of the harbor?"

The defendant objected to the question, as calling for irrelevant, incompetent and immaterial testimony, and as in nowise tending to prove or disprove any of the issues in this case. The Court overruled the objection, and the defendant then and there, in open Court, duly excepted to the ruling and action of the Court.

The witness answered: "Yes sir."

Thereupon the plaintiff propounded the following question to the witness:

"Would there not be danger to shipping in the port from obstructions, such as logs, rafts or barges, or anything of that kind, were it not for supervision to see that it was kept clear?"

The defendant objected to the question as calling for irrelevant, incompetent and immaterial testimony, and as in nowise tending to prove or disprove any of the issues in this case. The Court overruled the objection, and the defendant then and there, in open Court, excepted to the ruling and action of the Court.

The witness answered: "Yes sir."

Thereupon the plaintiff propounded the following question to the witness:

"And, of course, as you said just now, there would be danger from anything like improper anchorage to a vessel, would there not?"

The defendant objected to the question as calling for irrelevant, incompetent and immaterial testimony, and as in nowise tending to prove or disprove any of the issues in this case. The Court overruled the objection, and the defendant then and there, in open Court, duly excepted to the ruling and action of the Court.

The witness answered: "Yes sir."

Thereupon the plaintiff propounded the following question to the witness:

"Based upon what you have said, is it or not necessary for the safety of all vessels in the port that there be that constant supervision over the port in all of these ways that you have referred to in your testimony, so as to prevent vessels from meeting with damage and to protect them while in port?"

[fol. 38] The defendant objected to the question as calling for irrelevant, incompetent and immaterial testimony, and as in nowise tending to prove or disprove any of the issues in this case. The Court overruled the objection, and the defendant then and there, in open Court, excepted to the ruling and action of the Court.

The witness answered: "Yes sir," and continued:

"I have never known of any agency for the protection of shipping from these sources of danger other than the harbormaster, and prior to that office, the chief wharfinger. It devolves upon me to do these things and I do them by virtue of the rules and regulations that have been formulated and put in force by the State Docks Commission. As harbormaster I have been called upon at various times by people, including the defendant, to exercise that supervisory duty placed upon me. I have been called upon by the Clyde Mallory Lines verbally and in writing."

Thereupon the plaintiff offered in evidence a letter to the harbormaster which the witness stated was in the handwriting of Mr. Quincy, dated May 27, 1933, which was marked "Plaintiff's Exhibit F", to the introduction of which the defendant objected on the ground that the letter was irrelevant and immaterial; the Court overruled the objection, and the defendant then and there, in open court, excepted to the ruling of the Court. Said Exhibit F was in words and figures as follows:

PLAINTIFF'S EXHIBIT "F"—4/12/34—C. A. S.

Clyde-Mallory Lines

Clyde Steamship Company

Mallory Steamship Company

E. E. Quincy, Agent

Foot Lipscombe Street (AGWI)
(LINES)

Mobile, Ala., May 27th, 1933
300.8
300.20

Capt. Charles Smith, Harbor Master,
Mobile, Ala.

DEAR SIR:

I have been approached by our several Captains with reference to the location of the Dredge "San Diego" and her pipe line now operating in the lower river.

They advise me that they are of the opinion that there is not sufficient clearance for the vessels to pass, it being necessary for the ships to hold too closely to the docks.

Your attention is called to this condition with hopes that you will be able to have it rectified in order to avoid any accident.

Yours very truly,

EEQ:ELD. E. E. Quincy, Agent.

[fol. 39] The witness continued:

"The Steamship "Agwidale" was one of the vessels operated by the defendant."

Plaintiff offered in evidence a paper writing marked "Plaintiff's Exhibit G", to which the defendant objected, as irrelevant, and immaterial. The Court overruled the objection, and the defendant then and there, in open court, duly excepted to the ruling and action of the Court. Plaintiff's Exhibit G was in words and figures as follows:

PLAINTIFF'S EXHIBIT "G"—4/12/34—C. A. S.

Clyde-Mallory Lines

Clyde Steamship Company

Mallory Steamship Company

(AGWI)
(LINES)

Interoffice Correspondence, Mobile, Ala.

SS. Agwidale—Pier 4.
May 25th, 1933.

Capt. Charles Smith, Harbor Master,
Mobile, Ala.

DEAR SIR:

I am reporting that when passing the Dredge "San Diego" now operating in the River, that in my opinion there is not enough clearance, the ship passing having to hug the Dock too closely and making it hard to avoid hitting same with the stern when getting back into the river again.

Coming up it was bad; must be worse, swinging on Starboard wheel, bound out.

Respectfully,
A. Clifford, Master. SS. Agwidale.

On cross-examination, the witness continued:

"I guess the same physical conditions which I have described have always existed in Mobile, except that there have been improvements in the river by deepening parts of it, by keeping ships from anchoring at will and by the construction of other aids to navigation. I suppose at every port there are always physical obstructions to vessels entering and leaving. Some ports are more difficult than others, on account of narrow rivers, etc. Every port has a port warden or harbormaster or commissioner of some kind who is in charge and supervision of the port. I suppose [fol. 40] every port has regulations with reference to the mooring of vessels and the anchoring and berthing of vessels for the safety of craft in the harbor. As to whether Mobile is different from any other port, mighty few of them have a river as narrow as we have. I don't say that Mo-

bile is the most difficult and dangerous port in the United States. I said the river is narrower than lots of other ports. I suppose there are other ports where there are narrower channels than Mobile.

"I am familiar with the items about which this suit arises, I am familiar with these claims and the charges which are made are not for shifting any one of defendant's vessels, nor are they for mooring any one of the vessels belonging to the defendant."

Thereupon the following questions were asked the witness, and the following respective answers made by the witness:

Q. "The charge, as a matter of fact, is for the mere privilege of entering the harbor, isn't it?"

A. "No sir, it is a fee charged for seeing that the conditions are safe for ships to get in and out of the harbor, and we feel like we are giving service in that way."

Q. "And is that a service for one boat any more than it is for another?"

A. "No sir."

Q. "It is just a service for the public?"

A. "That is all."

The witness continued:

"I am familiar with the paper writing marked "Plaintiff's Exhibit B", which is a certified copy of the minutes fixing these harbor fees. As to what the words '500 tons' mean, and as to describing those words and what they mean, it is something in making these charges; there had to be a division point; you could not charge a boat like a tugboat or the "Tarpon" as much as you would a five or six thousand ton ship; so, in order to arrive at a division point to make these different charges, well they could have said so many feet long or tonnage, and they used tonnage." It is a classification based on the size of the vessel. That '500 tons' means the vessel's net registered tonnage shown on the vessel's papers, her license or enrollment, or whatever papers she may carry, and that is the tonnage which is fixed by the representative of the United States Collector of Customs when she is measured.

"As to whether I had the Dredge "San Diego" shifted [fol. 41] as to which these letters marked 'Plaintiff's Exhibits F and G' were in regard to, I investigated the condi-

tions, and at the time I went there—of course these letters were mailed—and I saw that the dredge in my opinion was giving ample room for ships to pass by. Evidently there was room, for all of the ships were coming in and out of the port at the time without any damage or injury; but I also wrote Mr. Quincy and told him this being a Government dredge and being a Government project, I advised him to take up with the Engineer about the case, because I did not want to go bucking with the Federal Government; but I talked to the captain and he said he was always willing to give way and had moved on two or three occasions, and he was willing to move. I did not make any charge for that service.

"Going back to Plaintiff's Exhibit B, and with reference to that portion thereof as to vessels under 500 tons making weekly trips, if there is a vessel under 500 tons that is not making weekly trips, we made a five dollar charge, which is for the same that other vessels are charged for. The Tug "Buzzard" is a local tug, there is no charge on her, she is in port all the time. We do not make the charge that we have made in this suit for boats that remain in the harbor all the time. I do not know whether there is any difference between the benefits that these boats which remain in the harbor receive from this supervision and the benefits for the boats which come into the harbor receive. I suppose the former are here and under the conditions, it is just a matter of courtesy, I presume. The charges which are the basis of this suit are for trips in and out of the harbor. If a ship don't go out of the harbor and don't come in, but is just laid up, we make no charge. There would be no way to base a charge if a boat is in here all the time. The charges for which this suit is brought are only for trips. On harbor craft, such as tugs and barges, and the boats that don't go out of the harbor, but remain here all the time, there is no charge assessed against them such as we are trying to collect in this case. I suppose harbor craft, such as tugs, barges and boats that do not go out of the harbor, naturally receive the same benefits in the harbor as boats that come in and out. In assessing the charge that we are seeking to collect in this case, the charge is assessed wholly and without regard to the value of the boat. If the boat's net registered tonnage is more than 500 tons, it don't matter whether she is worth $10,000.00 or $100,000.00; and if she is under

[fol. 42] 500 tons, it don't matter whether she is worth $2,000.00 or $50,000.00.

"As to whether the United States Government through the United States Engineers Office exercised a supervision to an extent over the port, they do not get out of the dredged channel. They are supposed to be in the dredged channel, but they don't dig outside of that. They don't butt in outside of that without somebody might need or request a little help. They might do it. They dredge the channel, but as far as supervision or keeping it clear, they expect the port authorities to keep it clear. They don't allow the channel to have stationary obstructions, but if we find a snag or such things in the channel and notify the United States Engineers Office, they get it out. We have a launch there for clearing the channel outside of the docks property. If a snag is in the way of moving or maneuvering a ship, we move the snag away, but as a matter of fact that work is usually and generally done by the United States Engineers Office.

"The fees that are sued for in this case do not represent any charge for the use of the State Docks. The Mallory Line Dock is separate and apart from the State Docks Terminals. I think that the City of Mobile has a special officer that keeps an eye on oil being pumped or floating in the water. I am in charge of that and he is a city man."

On redirect examination, the witness testified:

"With reference to my testimony on cross examination as to physical conditions being the same now as from time immemorial, hazards of a port increase in proportion to the growth of traffic. There are more ships, and in that way it would increase the danger. The larger the ships, naturally the more danger there is and the greater the danger to the other shipping."

Thereupon the following question was propounded to the witness by the plaintiff:

"You were asked about other ports—*it is* not a fact that there are the same harbor fees in other ports, such as Wilmington, North Carolina, or do you know?"

The defendant objected to the question, as calling for irrelevant, incompetent and immaterial testimony; the Court overruled the objection, and the defendant then and there duly excepted to the ruling and action of the Court.

The witness answered: "Yes sir."

[fol. 43] Thereupon the following question was propounded to the witness by the plaintiff:

"Are there any such harbor fees in the City of Charleston, South Carolina?"

The defendant objected to the question as calling for irrelevant, incompetent and immaterial testimony; the Court overruled the objection, and the defendant then and there duly excepted to the ruling and action of the Court.

The witness answered: "Yes sir."

Thereupon the following question was propounded to the witness by the plaintiff:

"Are there any such harbor fees in the Harbor of Jacksonville, Florida?"

The defendant objected to the question, as calling for irrelevant, incompetent and immaterial testimony; the Court overruled the objection, and the defendant then and there duly excepted to the ruling and action of the Court.

The witness answered:

"Yes sir, with the exception of these harbor fees in these ports, they are mostly about twice the amount they are in Mobile; otherwise, there are harbor fees charged."

Thereupon the defendant moved to exclude the answer of the witness, on the grounds that it was irrelevant, incompetent and immaterial; the Court overruled defendant's motion, and the defendant then and there duly excepted to the ruling and action of the Court.

Thereupon the plaintiff propounded the following question to the witness:

"You were asked if the services rendered are not services for the public—do you mean by the public that part of the public that would consist of a part of the City of Mobile, or of public shipping in the harbor of Mobile?"

Thereupon the defendant objected to the question as leading; the Court overruled the objection, and the defendant then and there duly excepted to the ruling and action of the Court.

The witness answered:

"It is applying to the shipping."

On cross-examination, the witness testified:

[fol. 44] "The charge that is made in this case is for my supervision over the harbor and the regulations that are made and enforced for the safety of ships coming in and going out. That is a true statement of the plaintiff's claim in this suit. The City of Mobile has traffic officers I know that the City directs traffic in the city through its traffic officers. I suppose that that is for the safety of the motorists using the highways. It is for the common good. As to the difference in principle between what I do and the City does through its traffic officers, I think it requires a little more knowledge of the ship's rights to take care of ships. In principle I suppose it is the same thing."

C. E. Sauls, plaintiff's witness, after having been first duly sworn, testified on direct examination as follows:

"I am Assistant General Manager at the State Docks, and before that was engineer for about five or six years. I did have supervision of the port, the harbormaster and assistants being under my direction. I have been employed at the State Docks eight years."

Thereupon, the plaintiff propounded the following question to the witness:

"State to the Court whether or not in your opinion it is necessary for the safety of shipping in the Port of Mobile that there be supervision of that shipping, as you have in the Port of Mobile?"

The defendant objected to the question, as calling for a conclusion of the witness, the Court overruled the said objection, and the defendant then and there, in open Court, duly excepted to the ruling and action of the Court.

The witness answered:

"I consider it very essential that the use of the harbor for shipping be regulated."

The defendant moved to exclude the witness' answer, because it was a conclusion of the witness; the Court over-

ruled defendant's motion, and the defendant then and there duly excepted to the ruling and action of the Court.

Thereupon the plaintiff rested.

E. E. QUINCY, defendant's witness, being first duly sworn, testified on direct examination as follows:

"I am and have been serving for ten years in Mobile as the Mobile agent of the defendant. I am familiar with the charges that the State, through the State Docks Commis-[fol. 45] sion, is trying to recover in this case. There was no service whatsoever rendered defendant's vessel, or any one of them, for which these charges are being made. All bills on the defendant's vessels for services rendered to each vessel have already been paid."

On cross-examination, the witness testified:

"Q. When you say no service was rendered, you mean no service for that particular ship, do you not?

A. That relate to this bill?

Q. Yes sir.

A. No service rendered.

Q. You mean no service was rendered for that particular vessel, do you not?

A. Not on them.

Q. For any of them?

A. Any one of them.

Q. You do not mean to say that the harbormaster did not render his services as supervising master of the harbor, do you?

A. Not to my knowledge."

Thereupon the defendant rested its case.

The above and foregoing was all the evidence adduced on the trial of the above styled cause.

Whereupon, and on said date, namely, April 12, 1934, the Court entered a judgment in favor of the plaintiff and against the defendant in the sum of $2,190.00 and costs, to which judgment the defendant then and there, in open Court, duly and legally excepted.

Wherefore, the defendant, Clyde Mallory Lines, prays that this be taken as its legal bill of exceptions in said cause, upon the same being signed by the Honorable J. Blocker Thornton, the Judge presiding at the trial of said cause, said bill of exceptions having been presented to the said Judge within the time allowed by law. And the said Honorable J. Blocker Thornton, Judge of the Circuit Court of Mobile County, Alabama, and who presided at the trial of said cause, does now accordingly, on the 22nd day of June, 1934, within the time provided by law and within sixty days from the date of the presentment of said bill of exceptions, sign this bill of exceptions as the said Clyde Mallory Lines' true and legal bill of exceptions in said cause.

J. Blocker Thornton, Judge Presiding.

[fol. 46] I hereby certify that the foregoing bill of exceptions was presented to me, the Judge who presided at the trial of the above styled cause, on this 14th day of June, 1934, within ninety days after the date of the entry of the judgment in this cause, and as provided by law.

J. Blocker Thornton, Judge Presiding.

[File endorsement omitted.]

Bond on Appeal for $4,500.00 approved and filed May 12, 1934, omitted in printing.

[fol. 47] Citation in usual form showing service on S. P. Gaillard, Sr., omitted in printing.

[fol. 48] Clerk's Certificate to foregoing Transcript omitted in printing.

[fol. 49] IN SUPREME COURT OF ALABAMA

[Title omitted]

ASSIGNMENTS OF ERROR

Comes the appellant and says and shows unto the Court that there is manifest error in the foregoing record, and for grounds thereof, says that the Court below erred, to appellant's prejudice and damage, in the following particulars, separately and severally:

1. In ruling and holding that the State Docks Commission has the right to levy fines or fees to maintain the public service under its police powers (Tr. 17-18).

2. In ruling and holding that the State Docks Commission had not violated any of the provisions of the Federal or State Constitution alleged or set up in the pleas (Tr. 18, 14-16).

3. In overruling the defendant's demurrers filed April 17, 1933 (Tr. 8-10), to count 3 of the complaint (Tr. 1-8, 12; 11).

4. In overruling defendant's additional demurrers filed April 22, 1933, to count 3 of plaintiff's complaint (Tr. 10-12; 1-8, 12).

5. In overruling defendant's demurrers filed December 6, 1933, to count 3 as last amended (Tr. 8-11; 13-14; 1-8, 12, 13).

6. In adjudging in favor of the plaintiff and against the defendant (Tr. 16-17; 45).

7. In entering a judgment in favor of the plaintiff and against the defendant in the sum of $2,190.00 and costs (Tr. 16-17; 45).

8. In overruling the defendant's objection to the stipulation of the parties covering the number of voyages made by defendant's vessels; and in admitting said stipulation in evidence (Tr. 19).

9. In overruling the defendant's objection to the resolution of the State Docks Commission dated February 25, 1924; and in permitting a certified copy of the said minutes to be offered in evidence (Tr. 19-20).

10. In overruling the defendant's objection to the certified copy of the minutes of the State Docks Commission of date March 5, 1924; and in permitting said minutes to be introduced in evidence (Tr. 21-23).

11. In overruling the defendant's objection to the certified copy of minutes of the State Docks Commission dated February 11, 1928; and in permitting the introduction of said minutes in evidence (Tr. 23-33).

12. In overruling the defendant's objection to the question to the witness Smith to explain the contour and physical outlines of the Harbor of Mobile above Beacon 40; and in permitting the answer of said witness to be introduced in evidence (Tr. 34).

13. In overruling defendant's objection to the following question propounded by the plaintiff to the witness Smith:

"Where is the principal anchorage for vessels entering the harbor?" (Tr. 34).

[fol. 50] 14. In overruling defendant's objection to the following question propounded by the plaintiff to the witness Smith:

"Explain to the Court, if you will, whether there are industries or improvements on both sides of the harbor from the mouth of the river up to and beyond the State Docks?" (Tr. 34-35).

15. In overruling defendant's objection to the following question propounded by the plaintiff to the witness Smith:

"State to the Court whether or not there is danger from collision from vessels going up and down the channel, entering and leaving the channel, and from vessels that might be coming out of slips or from alongside wharfs swinging into the channel." (Tr. 36).

16. In overruling defendant's objection to the following question propounded by the plaintiff to the witness Smith:

"Would there not be like danger if the ship were anchored firm and fast at any point that might be in front of a slip or wharf from which one of these vessels were going to come out?" (Tr. 36).

17. In overruling defendant's objection to the following question propounded by the plaintiff to the witness Smith:

"Then is it or not necessary that there be supervision over the port so as to avoid collisions of that kind, and to see that vessels coming into the port do not endanger the shipping by discharging oil or gas on the waters of the harbor?" (Tr. 36-37).

18. In overruling defendant's objection to the following question propounded by the plaintiff to the witness Smith:

"Would there not be danger to shipping in the port from obstructions, such as logs, rafts or barges, or anything of that kind, were it not for supervision to see that it was kept clear?" (Tr. 37).

19. In overruling defendant's objection to the following question propounded by the plaintiff to the witness Smith:

"And, of course, as you said just now, there would be danger from anything like improper anchorage to a vessel, would there not?" (Tr. 37).

20. In overruling defendant's objection to the following question propounded by the plaintiff to the witness Smith:

"Based upon what you have said, is it or not necessary for the safety of all vessels in the port that there be that constant supervision over the port in all of these ways that you have referred to in your testimony so as to prevent vessels from meeting with damage and to protect them while in port?" (Tr. 37-38).

21. In overruling defendant's objection to the offer in evidence by plaintiff of letter marked "Plaintiff's Exhibit F"; and in permitting said letter to be introduced in evidence (Tr. 38).

22. In overruling defendant's objections to paper writing marked "Plaintiff's Exhibit G", offered in evidence by the plaintiff; and in permitting said paper writing to be introduced in evidence (Tr. 39).

[fol. 51] 23. In overruling the defendant's objection to the following question propounded by the plaintiff to the witness Smith:

"You were asked about other ports—is it not a fact that these are the same harbor fees in other ports, such as Wilmington, North Carolina, or do you know?" (Tr. 42).

24. In overruling the defendant's objection to the following question propounded by the plaintiff to the witness Smith:

"Are there any such harbor fees in the City of Charleston, South Carolina?" (Tr. 43).

25. In overruling the defendant's objection to the following question propounded by the plaintiff to the witness Smith:

"Are there any such harbor fees in the Harbor of Jacksonville, Florida?" (Tr. 43).

26. In overruling the defendant's motion to exclude the following answer of the witness Smith:

"Yes sir, with the exception of these harbor fees in these ports they are mostly about twice the amount they are in Mobile; otherwise there are harbor fees charged." (Tr. 43).

27. In overruling defendant's objection to the following question propounded by the plaintiff to the witness Smith:

"You were asked if the services rendered are not services for the public—do you mean by the public that part of the public that would consist of a part of the City of Mobile, or of public shipping in the Harbor of Mobile?" (Tr. 43).

28. In overruling the defendant's objection to the following question propounded by the plaintiff to the witness Sauls:

"State to the Court whether or not in your opinion it is necessary for the safety of shipping in the Port of Mobile that there be supervision of that shipping, as you have in the Port of Mobile?" (Tr. 44).

29. In overruling the defendant's motion to exclude the following answer of the witness Sauls:

"I consider it very essential that the use of the harbor for shipping be regulated." (Tr. 44).

Pillans, Cowley & Gresham, Counsel for Appellant, Clyde Mallory Lines.

[fol. 52] IN SUPREME COURT OF ALABAMA

[Title omitted]

MINUTE ENTRY—Nov. 13, 1934

Come the parties by attorneys, and argue and submit this cause for decision.

[fol. 53] IN SUPREME COURT OF ALABAMA

Present: Chief Justice Anderson and Associate Justices Gardner, Bouldin and Foster.

Mobile Circuit Court, 1st Div., 822

CLYDE MALLORY LINES, a Corp.,

vs.

STATE OF ALA. EX REL. STATE DOCKS COMMISSION

JUDGMENT—January 24, 1935

Come the parties by attorneys, and the record and matters therein assigned for errors, being argued and submitted and duly examined and understood by the Court, it is considered that in the record and proceedings of the Circuit Court there is no error. It is therefore considered that the judgment of the Circuit Court be in all things affirmed. It is also considered that the Appellant and National Surety Corporation, surety on the appeal bond, pay the amount of the judgment of the Circuit Court and 10% damages thereon and interest and the costs of appeal of this Court and of the Circuit Court.

[fol. 54] IN SUPREME COURT OF ALABAMA, OCTOBER TERM, 1934-35

1 Div., 822

CLYDE MALLORY LINES

v.

STATE OF ALABAMA, EX REL. STATE DOCKS COMMISSION

Appeal from Mobile Circuit Court

OPINION—Jan. 24, 1935

BOULDIN, J.:

The State of Alabama, on the relation of the State Docks Commission, brought suit against Clyde Mallory Lines to recover a sum alleged to be due for "Harbor Fees" prescribed by order of said commission.

By such order the commission fixed a schedule of "Harbor Fees for the purpose of meeting the expense attendant upon the supervision of the Port and execution of the regulations and providing for the proper accommodation of vessels at this Port."

[fol. 55] This schedule included the following:

"Vessels under 500 tons making weekly trips	$2.50
Vessels under 500 tons	5.00
Vessels 500 tons and over	7.50"

Clyde Mallory Lines operates ships in the coast-wise trade between New York and Mobile, all over 500 tons, registered tonnage.

The demand sued for covers items accruing wholly under the schedule of "Vessels, 500 tons and over, $7.50."

Special fees are scheduled for "shifting" and "mooring" of vessels.

This harbor fee of $7.50, under the evidence, as well as the tenor of the above order, is a charge against each vessel of that class entering the harbor in the conduct of its shipping business.

This charge is challenged as in violation of two provisions of the Constitution of the United States. First, that it lays a "duty of tonnage" forbidden to any State, with-

out the consent of Congress. Art. 1, Sec. 10, Clause 3. Second, that it imposes an unlawful burden on interstate commerce, and violative of Art. 1, Sec. 8, Clause 3.

The State Docks Commission is a State agency created in 1923.—Acts 1923, page 330. Among its duties and powers is the construction and operation of State docks, terminals, and other facilities, in aid of commerce and shipping through the Port of Mobile, a State project authorized by constitutional amendment. This function is not here involved.

The State Docks Commission was also created in lieu of a State Harbor Commission, and vested with the powers and duties theretofore pertaining to the State Harbor Com- [fol. 56] mission under Chapter 44 of the Code of 1923, Section 2727, et seq.; Acts of 1923, page 330, Section 2.

By an Act of January 17th, 1927 (Acts 1927, page 1), the functions and powers of the State Docks Commission were further defined.

The jurisdiction of the commission extends over the waters and shores of Mobile River and its tributaries to the head of tidewater, and to the outer bar of Mobile Bay.—Code, § 2434; Acts 1927, page 1, Section 3.

The State Docks Commission is charged with the "operation" of the ha-bor and seaport, and empowered to "adopt rules not inconsistent with the provisions of this Act for the purpose of regulating, controlling and conducting the said operation."—Acts 1927, pages 8, 13 and 14, §§ 9 and 18.

The commission is authorized to "fix from time to time reasonable rates of charges for all services and for the use of all improvements and facilities provided under the authority of this Act."—Acts 19[illegible] page 12, § 14. See, also, Code § 2443.

The State Docks Commission did adopt and promulgate in 1924, and re-adopt in 1927, rules and regulations, 17 in number, deemed by the commission best adapted to conditions in that harbor.

The inner harbor is defined as beginning at Beacon 40 located in the bay, some two miles out from the mouth of Mobile River, and extends up the river and tributaries to the head of tidewater, a distance of some four miles above the mouth of Mobile River.

The busy shipping zone is in the lower stretches of the river, which is 800 to 1,000 feet in width. The dredged

channel for navigation is 500 feet in width up to the State [fol. 57] docks, and then narrows to 300 feet.

A synopsis of the rules and regulations above-mentioned will appear in the report of the case.

Suffice to say here, they look to the safety of vessels, and the dispatch of shipping business in the port. For such purpose an active and continuous harbor-master service is provided through a Chief Wharfinger and his deputies.

The supervision thus provided and shown by evidence to be necessary covers services properly referable to "mooring" and "shifting" of vessels for which a special fee is fixed.

But supervision extends to keeping the channel clear, not only by the placement of ships and their proper anchorage, but by controlling rafts, &c.; and protection against fire from the discharge of oils on the waters.

These services may be said to inure to each vessel which enters the harbor and comes within the zone where such supervision affords protection.

Other regulations and the active supervision required to assure their observance constitute a more direct service to each ship.

Each ship is required to notify the harbor master of its arrival; the pilot is required to furnish the shipmaster with a copy of the harbor rules and regulations, and on entering the harbor there is a continuing duty on the State agents to see that the speed rules are observed, and that all ships and craft accommodate their movements so as to [fol. 58] effect a fair joint use of the facilities of the port.

The evidence well supports a finding that the harbor fee in question is not a tax imposed for the privilege of entering the port, a tax on the privilege of navigation upon the navigable waters, but a charge to cover the expenses of the State agency in supervising and operating the port so that ships may enter and depart from the port in safety and without unnecessary delay; an expense of facilitating navigation, promoting commerce. It is not claimed that the schedule of fees, nor the particular fee in question, is excessive, if permissible for the purposes mentioned.

It may be truly said the general supervision or policing of the harbor to maintain conditions of safety therein in all kinds of weather is for the benefit of the shipping public. But this is true because of service to each ship, as a part of

the shipping public. We can discern no difference in principle between a service rendered to the ship on its arrival, and that rendered in advance to make the harbor safe to enter on its arrival. The outlay for such service goes to the protection of the ship while in the harbor, and to facilitate its movements therein. The outlay is not for the making of rules and regulations, but for the expenses of a personnel and an equipment of harbor craft to actively "operate" the harbor, to use the wording of the statute, under and in accordance with such necessary regulations. We cannot question that each and every ship shares in this service.

In measuring the benefits so conferred, the classification of ships according to size, "500 tons and over," at one rate, and under "500 tons" at a lower rate, would seem to be unobjectionable, but rather in keeping with the general [fol. 59] purpose to make the charges proportionate to the benefits received.

In this connection, special fees for "mooring" and "shifting," chargeable to ships who receive such service, would not seem to bar a separate charge for services common to all ships. To make such special fees yield an income to meet the expense for the services here shown, would, we think, unfairly burden vessels receiving these special services, while others sharing in the benefits of such outlays would be relieved. So, a schedule, fixing several charges, each ship subject to one or more as the case may be, but in the aggregate not in excess of the reasonable expense of the service to such ship, seems clearly just.

Does the Constitution of the United States forbid such charges or fees?

The decisions of the Supreme Court of the United States are and must be controlling on the question.

In numerous decisions "duty of tonnage" has been considered and defined. We have considered these cases with care in the light of the facts presented therein.

In many cases the general proposition is stated that all levies by the State, or its authority, for the privilege of entering a harbor, the exercise of the free right of navigation upon navigable waters, are forbidden, being within the evils aimed at by the Constitution. This is true whether such tax is imposed strictly on a basis of tonnage or otherwise.

Navigation is a part of commerce, and a tax burden imposed on the one is a burden on the other.

Duty of tonnage is forbidden likewise as to vessels navigating the waters of a State, even ships engaged in intrastate commerce.—Steamship Company v. Portwardens, 6 [fol. 60] Wallace 31; State Tonnage Tax Cases, 12 Wallace 204; Peete v. Morgan, 19 Wallace 581; Cannon v. New Orleans, 20 Wallace 577; Inman Steamship Co. v. Tinker, 94 U. S. 238; Transportation Company v. Parkersburg, 107 U. S. 691; Gibbons v. Ogden, 9 Wheaton 1, 201-3.

On the other hand, fees or charges imposed under State laws for wharfage, pilot service, and quarantine purposes, as compensation for the service, when rendered by private agencies, or to cover the expense of providing such service by state or municipal authority, are not duties on tonnage.—Cooley v. Board of Wardens, etc., 12 Howard 299, 312, 314; Packet Company v. Keokuk, 95 U. S. 80; Vicksburg v. Tobin, 100 U. S. 430; Packet Company v. St. Louis, 100 U. S. 423; Transportation Company v. Parkersburg, supra; Packet Company v. Catlettsburg, 105 U. S. 559; Morgan's Steamship Company v. Louisiana Board of Health, et al., 118 U. S. 455; Huse v. Glover, 119 U. S. 543.

In several of these cases the court discusses the principles underlying the distinction between tonnage taxes and fees and charges for services or facilities in aid of navigation and commerce.

In Cooley v. Board of Wardens, etc., supra, speaking of these provisions of the Federal Constitution, it was said:

"This provision of the Constitution was intended to operate upon subjects actually existing and well understood when the Constitution was formed. Imposts and duties on imports, exports, and tonnage were then known to the commerce of a civilized world to be as distinct from fees and charges for pilotage, and from the penalties by which commercial States enforced their pilot-laws, as they were from charges for wharfage or towage, or any other local port-charges for services rendered to vessels or cargoes; and to declare that such pilot-fees or penalties, are embraced within the words imposts or duties on imports, experts, or tonnage, would be to confound things essentially different, and which must have been known to be actually different by those who used this language."—12 Howard, 299 [314].

[fol. 61] In that case pilot fees, imposed whether a pilot was used or not, were sustained on the ground of the propriety of maintaning a pilot-service for protection against dangers of navigation in the absence of such service. The income from fees, where no pilot was used, went to a pilots' widows' and orphans' fund.

This ruling has been often re-affirmed.

Speaking of harbor regulations in Inman Steamship Company v. Tinker, supra, it was said:

"Similar provisions, varying according to local circumstances, exist at all important points throughout the world whither marine commerce finds its way. They are indispensable to those engaged in that business. They fence out many evils, and promote largely the convenience and the welfare of those engaged in this field of enterprise. Perhaps it is hardly too strong language to say, they are well nigh vital to commerce itself. It may be conceded, also, that foreign steamships and other vessels visiting the ports of a State for business purposes may be made liable by the laws of such State for all reasonable and proper port charges. This is but a fair return for the benefits received."—94 U. S. 238 [244].

In that case the charge was imposed strictly on the basis of the registered tonnage of the vessel. From a reading of the facts, in connection with the opinion, it appears the court deemed the levy oppressive, and without relation to the service rendered. It was held void because a tonnage tax, citing earlier cases. The opinion proceeds:

"The tax imposed is not merely a mode of measuring the compensation to be paid. The answer to this suggestion is, that it is exacted where there is nothing to be paid for, and has no reference to any circumstance in this connection but the tonnage of the vessel and the class to which it belongs." [fol. 62]—94 U. S. 245.

Reviewing these cases in Morgan's Steamship Company v. Louisiana Board of Health, et al, supra, it was said:

"But in all these cases the contribution exacted was measured by the tonnage of the vessel in express terms; and the decision of the court rested on that fact."—118 U. S. 462-463.

In Packet Company v. Catlettsburg, supra, regulations imposing wharfage fees at a municipal wharf, and requiring vessels to land at that wharf were sustained as proper and necessary in the particular case for the safety and convenience of ships and other pertinent interests.

In Huse v. Glover, supra, the State of Illinois installed and operated locks in the Illinois River, charging tolls for the use of the locks, to cover such outlays. These tolls were upheld against an insistence that they were tonnage taxes. Speaking of the ordinance of 1787, providing that the navigable waters in such territory should be free and "without any tax, impost, or duty," the court said:

"The exaction of tolls for passage through the locks is as compensation for the use of artificial facilities constructed, not as an impost upon the navigation of the stream. The provision of the clause that the navigable streams should be highways without any tax, impost, or duty, has reference to their navigation in their natural state. It did not contemplate that such navigation might not be improved by artificial means, by the removal of obstructions, or by the making of dams for deepening the waters, or by turning into the rivers waters from other streams to increase their depth. For outlays caused by such works the State may exact reasonable tolls. They are like charges for the use of wharves and docks constructed to facilitate the landing of persons and freight, and the taking them on board, or for the repair of vessels."—119 U. S. 548.

Speaking of tonnage duties, it was further said:

"A duty of tonnage within the meaning of the Constitution is a charge upon a vessel, according to its tonnage, as an instrument of commerce, for entering or leaving a port, or navigating the public waters of the country; and the prohibition was designed to prevent the States from imposing hindrances of this kind to commerce carried on by vessels." [fol. 63] —119 U. S. 549-550.

In Packet Company v. St. Louis, supra, the court reviewed the various duties imposed on the harbormaster, of St. Louis, and said:

"The duties thus imposed upon the harbormaster, if faithfully discharged, must, it will be conceded, materially advance, and not obstruct or burden trade and business on

the Mississippi River, especially at the port of St. Louis. Services rendered by him in the execution of those duties would be in aid, and not a hindrance, of commerce and navigation."—100 U. S. 427.

The authority and duty of the State to make proper harbor regulations suited to local conditions, and to actively supervise or operate the harbor in accordance with such regulations, in the absence of action by Congress, are now fully settled; that this must entail expense is obvious; that such service is not a hindrance to but in aid of shipping, is clear.

The question, then, resolves itself into the simple inquiry: Does the Constitution of the United States contemplate that such service shall be rendered at the expense of the taxpayers, or covered by some special fee not applicable to all ships which share the benefits of the service? We think not.

It is not questioned that the fees sued for were for the use of the harbor by appellant's ships in the conduct of the shipping business, that they had the benefit of the services outlined above, that the charges were reasonable for the service named in the order of the commission. Probably the insistence of appellant is that no charge can be made for such service.

In our opinion, the true test, under the decisions as we read them, is: Are the harbor fees a burden and hindrance [fol. 64] to navigation and commerce, or are they just return for the reasonable expense incurred in rendering a service facilitating navigation? Would shipping be better off without such service and no charge or with such service and such charge?

Thus viewing the case, we hold the fees in suit are lawful charges for such service.

Affirmed.

Anderson, C. J., Gardner and Foster, JJ., concur.

[fol. 65] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

Petition for Appeal, Assignments of Error, and Prayer for Reversal

PETITION FOR APPEAL

Considering itself aggrieved by the final decision and judgment of the Supreme Court of the State of Alabama in the above entitled cause, the defendant therein, Clyde Mallory Lines, hereby prays that an appeal therefrom and from each and every part thereof be allowed to the Supreme Court of the United States and for an order fixing the amount of the bond thereon.

ASSIGNMENTS OF ERROR

And the said Clyde Mallory Lines assigns the following errors in the record and proceedings in the said case:

1. The Supreme Court of Alabama erred in holding that the "harbor fee" of $7.50, prescribed by the Alabama State Docks Commission (a State agency created by State statutes and authorized thereby to operate all harbors and seaports within the State, to fix reasonable rates of charges for all services, and to promulgate rules and regulations for such operation—Act of September 18, 1923, § 2, Alabama General Acts 1923, page 330; Act of January 17, 1927, [fol. 66] §§ 3, 9, 14 and 18, Alabama General Acts 1927, page 1 et seq.) for each vessel of 500 tons or over entering the port of Mobile and by said State Docks Commission charged against the defendant's vessels of that class entering said port, was not a duty of tonnage forbidden by Article I, 10, Clause 3, of the Constitution of the United States.

2. The Supreme Court of Alabama erred in upholding the aforesaid "harbor fee", notwithstanding that in substance and essence it was a tax imposed for the privilege of entering the port of Mobile and of using the navigable waters thereof, and as such violated Article I, Section 10, Clause 3, of the Constitution of the United States.

3. The Supreme Court of Alabama erred in holding that the aforesaid "harbor fee" was enforceable against the

defendant as "a charge to cover the expenses of the State agency in supervising and operating the port so that ships may enter and depart from the port in safety and without unnecessary delay; an expense of facilitating navigation, promoting commerce".

4. The Supreme Court of Alabama erred in holding that the aforesaid "harbor fee" was for service rendered to each ship entering and using the port, without any showing that services of any kind were rendered in respect of such charges and notwithstanding that all services rendered the defendant's vessels by said State Docks Commission were otherwise paid for.

5. The Supreme Court of Alabama erred in upholding the aforesaid "harbor fee" charged against the defendant's vessels operating in the coastwise trade between New York and Mobile, notwithstanding that such fee was an undue burden on interstate commerce in viola-
[fols. 67-72] tion of Article I, Section 8, Clause 3, being the commerce clause, of the Constitution of the United States.

6. The Supreme Court of Alabama erred in affirming, and in failing to reverse, the judgment of the Circuit Court of Mobile County against the defendant.

PRAYER FOR REVERSAL

For which errors the defendant, Clyde Mallory Lines, prays that the said decision and judgment of the Supreme Court of the State of Alabama made January 24, 1935, in the above entitled cause, be reversed and a judgment rendered in favor of the said defendant, and for costs.

(Signed) Pillans, Cowley & Gresham; Burlingham, Veeder, Clark & Hupper, Counsel for Appellant.

[fol. 73] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL

Clyde Mallory Lines, the appellant in the above entitled suit, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the

judgment and decision made in the above entitled suit by the Supreme Court of the State of Alabama on the 24th day of January, 1935, and from each and every part thereof, and having presented and filed its petition for appeal, assignments of error and prayer for reversal, pursuant to the statutes and to the rules of the Supreme Court of the United States in such case made and provided;

It is now ordered that an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the Supreme Court of the State of Alabama in the above entitled cause, as provided by law;

And it is further ordered that the Clerk of the Supreme Court of the State of Alabama shall prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said Court within thirty days of this date;

[fols. 74 & 75] And it is further ordered that security for costs on appeal be fixed in the sum of $2500.00.

Dated: Apr. 10th, 1935.

(Signed) Jno. C. Anderson, Chief Justice of the Supreme Court of the State of Alabama.

[fols. 76 & 77] Citation in usual form showing service on A. P. Gaillard, filed April 15, 1935, omitted in printing.

[fol. 78] BOND ON APPEAL

Know all men by these presents, That we, Clyde Mallory Lines, a Corporation, as principal, and National Surety Corporation, a corporation, as surety, are held and firmly bound unto State of Alabama on the relation of State Docks Commission in the full and just sum of Twenty-five Hundred Dollars ($2500.00), to be paid to the said State of Alabama on the relation of the State Docks Commission, its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 10th day of April in the year of our Lord one thousand nine hundred and thirty-five.

Whereas, lately at a present term of the Supreme Court of the State of Alabama in a suit depending in said Court, between the said Clyde Mallory Lines as appellant, and State of Alabama on the relation of State Docks Commission as appellee; a judgment was rendered against the said Clyde Mallory Lines, and the said Clyde Mallory Lines having obtained an order allowing an appeal and filed said order in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said State of Alabama on the relation of State Docks Commission, citing and admonishing it to be and appear at a Supreme Court of the United States at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, that if the said Clyde Mallory Lines shall prosecute its appeal to effect, and answer all damages and costs if it fail to make [fol. 79] its plea good, then the above obligation to be void; else to remain in full force and virtue.

Clyde Mallory Lines, by Pillans, Cowley & Gresham, Attorneys in Fact and of Record. National Surety Corporation, by George B. Edward, Attorney in Fact. (Seal.)

Sealed and delivered in the presence of —— ——.

Approved by

Jno. C. Anderson, Chief Justice of the Supreme Court of the State of Alabama.

Execution stayed pending appeal.

[fol. 80] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 81] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON, AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed May 6, 1935

Comes now the appellant and adopts its assignments of error as its statement of the points to be relied upon, and

represents that the whole of the record, as filed, is necessary for the consideration of the case.

Roscoe H. Hupper, Alexis T. Gresham, Counsel for Appellant.

Service of a copy hereof acknowledged this, the 2nd day of May, 1935.

Gaillard & Gaillard, Counsel for Appellee.

[fol. 82] [File endorsement omitted.]

Endorsed on cover: File No. 39,573. Alabama Supreme Court. Term No. 43. Clyde Mallory Lines, Appellant, vs. The State of Alabama, ex rel. State Docks Commission. Filed May 6, 1935. File No. 43 O. T. 1935.

FILE COPY

Supreme Court, U.S.
FILED
MAY 6 1935
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. ~~345~~ 43

CLYDE MALLORY LINES,

Appellant,

vs.

STATE OF ALABAMA, EX REL. STATE DOCKS COMMISSION.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ALABAMA.

STATEMENT AS TO JURISDICTION.

ROSCOE H. HUPPER,
ALEXIS TARDY GRESHAM,
Counsel for Appellant.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 945

CLYDE MALLORY LINES,

Appellant,

vs.

STATE OF ALABAMA, EX REL. STATE DOCKS COMMISSION,

Appellee.

STATEMENT AS TO JURISDICTION ON APPEAL.

MAY IT PLEASE THE COURT:

The appellant in support of the jurisdiction of this Court to review the above entitled cause on appeal respectfully represents:

A.

Statutory Provision Sustaining Jurisdiction.

The Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 937 (United States Code, Title 28, Sec. 344), provides that Section 237 (a) of the Judicial Code is amended to read in part as follows:

"A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had * * * where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

B.

Statutes of the State the Validity of Which Is Involved.

State Docks Commission, a State agency of the State of Alabama, by order or resolution entered on February 25, 1924, prescribed, among other things, the payment of $7.50 for each vessel of 500 tons or over entering the Port of Mobile, Alabama; that order or resolution reading as follows:

"Alabama State Docks Commission,

Mobile, Alabama.

February 25th, 1924.

The regular monthly meeting of the State Docks Commission was held this day in the office of the Commission. Among other business transacted the following schedule of charges for Harbor Fees was adopted:

General Sibert presented to the Commission for consideration, a schedule of charges to be collected by the State Docks Commission for Harbor Fees for the purpose of meeting the expense attendant upon the super-

vision of the Port and execution of the regulations and providing for the proper accommodation of vessels at this Port.

Governor Henderson moved, seconded by Mr. Blair, to adopt the schedule of charges of Harbor Fees, effective March 1st, 1924, as follows:

Tugs engaged in coastwise towing, per trip	$2.50
Vessels under 500 tons, making weekly trips	2.50
Vessels under 500 tons	5.00
Vessels 500 tons and over	7.50
Shifting vessels in the harbor, 1,000 tons and over	10.00
Shifting vessels in the harbor, under 1,000 tons	5.00
Shifting vessels to or from Twelve Mile Island	20.00
Shifting vessels to or from Chichasaw Creek, inside L. & N. Bridge	15.00
Mooring vessels, under 1,000 tons	5.00
Mooring vessels, 1,000 tons or over	10.00''

(R. 20.)

An order of State Docks Commission of February 11, 1928, provided that "The Port Rules, Regulations and Fees governing the Port of Mobile were unanimously adopted." Said order further provided:

"Resolved, That the State Docks Commission, in virtue of and acting under the police and other powers of the State with which it is invested by Section 93 of the Code of Alabama, and the provisions of Sections 3, 6 and 18 of the State Docks Commission Act, approved January 17, 1927, which sections or portions thereof are set forth below:

"Section 3. The jurisdiction of the Commission in any harbor or seaport within the State shall extend over the waters and shores of such harbor or seaport and over that part of all tributary streams flowing into such harbor or seaport in which the tide ebbs and flows, and shall extend to the outer edge of the outer bar at such harbor or seaport.

C.

Date of Judgment and Date of Application for Appeal.

The judgment sought to be reviewed was entered on the 24th day of January, 1935.

The application for appeal was presented on the 10th day of April, 1935.

Nature of the Case, Ruling Below, and Cases Believed to Sustain the Jurisdiction.

This action is a demand by the State of Alabama on relation of the State Docks Commission of the appellant, owner of vessels of over 500 tons each, engaged in interstate commerce, which made regular trips into the harbor of Mobile; for the payment of $7.50 for each entry of each vessel into said harbor, as prescribed in said orders of said Commission.

The demand was resisted on the grounds that those charges are duties of tonnage and an undue burden on interstate commerce: as such, violative of those portions of Sections 8 and 10, Article I, of the Constitution of the United States, providing respectively: "The congress shall have power: * * * To regulate commerce with foreign nations, and among the several states, * * *"; and "No state shall, without the consent of congress, lay any duty of tonnage, * * *"; and that, therefore, the orders of the Commission prescribing those charges are repugnant to the quoted Constitutional provisions.

The Supreme Court of the State of Alabama decided that said orders and charges were lawful and neither repugnant to nor violative of said provisions of the Constitution; and that, therefore, the State on the relation of the Commission may recover said charges of the appellant-shipowner in this action.

The following decisions of this Court are believed to sustain jurisdiction of this appeal:

King Manufacturing Company v. *City Council of Augusta et al.*, 277 U. S. 100.

Sultan Railway & Timber Company v. *Department of Labor, etc., of Washington*, 277 U. S. 135.

Lake Erie & Western R. R. Company v. *Public Utilities Commission*, 249 U. S. 422, 424.

Appleby v. *Delaney*, 271 U. S. 403, 409.

We respectfully submit that this Court has jurisdiction of this appeal by virtue of Section 237 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Respectfully submitted,

(Signed) ROSCOE H. HUPPER,
(Signed) ALEXIS TARDY GRESHAM,
Counsel for Appellant.

FILE COPY

OCT 7 1935

SUPREME COURT OF THE UNITED STATES

No. 43 OCTOBER TERM 1935

CLYDE MALLORY LINES

Appellant

vs.

STATE OF ALABAMA, *ex rel.* STATE DOCKS COMMISSION

Appellee

ON APPEAL FROM SUPREME COURT OF ALABAMA

BRIEF FOR APPELLANT

ROSCOE H. HUPPER
ALEXIS T. GRESHAM
WILLIAM J. DEAN
Counsel for Appellant

The Evening Post Job Printing Office, Inc., 20 Lafayette St., New York, N. Y.

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SUPREME COURT OF THE UNITED STATES

CLYDE MALLORY LINES Appellant vs. STATE OF ALABAMA, *ex rel.* STATE DOCKS COMMISSION Appellee	No. 43 October Term 1935

BRIEF FOR APPELLANT

This is an appeal from a judgment of the Supreme Court of Alabama entered January 24, 1935, which affirmed a judgment of the Circuit Court of Mobile County for $2190 in favor of appellee (plaintiff below) against appellant (defendant below) based on "harbor fees" charged against appellant in respect of its steamships at Mobile during the period from February 4, 1928 to September 29, 1932. The opinion of the Supreme Court appears at R. 58-65 and is reported in 229 Ala. 624; 159 So. 53. The Circuit Court did not file an opinion, but the theory of its decision appears from "Ruling on Demurrers" (R. 20-21).

The Supreme Court of Alabama allowed an appeal to this Court April 10, 1935 (R. 67-68). Appellant duly filed the jurisdictional statement, and this Court by order of May 27, 1935, postponed further consideration of the question of jurisdiction to the hearing on the merits.

JURISDICTION

Jurisdiction of this Court is invoked under Judicial Code § 237(a), as amended by Act of February 13, 1925, c. 229, § 1, 43 Stat. 937; Title 28 U. S. C. § 344(a).

The judgment for $2190 in question is for "harbor fees" at the rate of $7.50 for each of appellant's vessels which entered the port of Mobile during the period February 4, 1928 to September 29, 1932. These fees were prescribed by an order of the State Docks Commission, a State agency, first created by the Alabama Legislature in 1923 (Ala. Acts 1923, p. 330) and authorized by an Act of January 17, 1927 (Ala. Acts 1927, p. 12) to

"fix from time to time reasonable rates of charges for all services and for the use of all improvements and facilities provided under the authority of this Act" (Opinion, R. 59).

The Docks Commission's order of February 11, 1928 (R. 28) fixed a schedule including, in addition to fees for specified services, the following (R. 37):

"Vessels under 500 tons—making weekly trips..	$2.50
Vessels under 500 tons.....	5.00
Vessels 500 tons and over.....	7.50"

This was a re-adoption of rules made February 25, 1924 (R. 23-24).

Appellant's vessels were of over 500 tons registered tonnage and were operated in interstate coastwise trade between New York and Mobile (R. 58).

The suit was begun February 4, 1933 (R. 22). Demurrers were overruled (R. 17) and the answer to the complaint challenged the legality of the $7.50 charge against appellant's vessels on the grounds: (1) that it

was a duty of tonnage forbidden by Art. I, § 10, Cl. 3, of the Federal Constitution; (2) that it imposed an unlawful burden on interstate commerce in violation of Art. I, § 8, Cl. 3, of the Constitution (R. 18). The Supreme Court of Alabama held the charge lawful and not in violation of the Constitution (R. 58-65).

The order of the State Docks Commission pursuant to the 1927 Statute had the status of a statute within the meaning of Judicial Code § 237-(a), and this Court has jurisdiction of this appeal. See *Hamilton* v. *Regents*, 293 U. S. 245, 257-258; *King Mfg. Co.* v. *Augusta*, 277 U. S. 100; *Sultan Ry.* v. *Dept. of Labor*, 277 U. S. 135.

Statement of the Case

Appellant's steamers have been regularly operating in the coastwise trade between New York and Mobile and other ports, for many years. The steamers did not use the State Docks, having another dock separate and apart, R. 48.

The defendant's Mobile agent testified, R. 51:

"All bills on the defendant's vessels for services rendered to each vessel have already been paid."

This was not controverted. He also testified, R. 51:

"There was no service whatsoever rendered defendant's vessel, or any one of them, for which these charges are being made."

This was not controverted either. Indeed, appellee's counsel stated at the trial that the fee in question was not for "a specific service to each particular boat or ship, but a service generally rendered each and every ship and all shipping that should come into the port" (R. 20). The

Mobile Harbor Master testified that the charge was "not for shifting" or "mooring" appellant's vessels (R. 46) nor "for the use of the State Docks" (R. 48).

In the course of his cross-examination he testified further, R. 46:

"Q. The charge, as a matter of fact, is for the mere privilege of entering the harbor, isn't it?

A. No sir, *it is a fee charged for seeing that the conditions are safe for ships to get in and out of the harbor,* and we feel like we are giving service in that way.

"Q. And is that a service for one boat any more that it is for another?

A. No sir.

"Q. It is just *a service for the public?*

A. *That is all"* (Italics ours).

That the charges in question were not compensation for specific service but were levied to raise revenue for public purposes, *i. e.,* harbor policing, is obvious from the final testimony of the Harbor Master as follows, R. 50:

"The charge that is made in this case is for my supervision over the harbor and the regulations that are made and enforced for the safety of ships coming in and going out. That is a true statement of the plaintiff's claim in this suit. The City of Mobile has traffic officers. I know that the City directs traffic in the city through its traffic officers. I suppose that that is for the safety of the motorists using the highways. It is for the common good. As to the difference in principle between what I do and the City does through its traffic officers, I think it requires a little more knowledge of the ship's rights to take care of ships. In principle I suppose it is the same thing".

The Harbor Master also testified (R. 47) that the charges in suit were "for trips in and out of the harbor" • • • "only for trips", not being made "for boats that remain in the harbor all the time" • • • "the charge is assessed wholly and without regard to the value of the boat".

It appears from the Harbor Master's testimony that the channel was dredged and kept free of obstructions by the United States Engineers, R. 48. This is pursuant to various Federal statutes.

The Docks Commission's original order of February 25, 1924 fixed a schedule of

"Harbor Fees for the purpose of meeting the expense attendant upon the supervision of the Port and execution of the regulations and providing for the proper accommodation of vessels at this Port" (R. 23, 58).

This did not contemplate particular service to any ship.

The Supreme Court of Alabama nevertheless held the Commission's order to be constitutional and valid and the fees in suit to be lawful charges for "such service". The Court said, R. 60-61:

"The evidence well supports a finding that the harbor fee in question is not a tax imposed for the privilege of entering the port, a tax on the privilege of navigation upon the navigable waters, but a charge to cover the expenses of the State agency in supervising and operating the port so that ships may enter and depart from the port in safety and without unnecessary delay; an expense of facilitating navigation, promoting commerce. • • •

"It may be truly said the *general supervision or policing of the harbor* to maintain conditions of safety therein in all kinds of weather is for the benefit of the shipping public. But this is true because of service to each ship, as a part of the shipping public" (Italics ours).

Assignments of Error

The assignments of error are at R. 66-67 and raise the objections based on Art. I, Sec. 10, Cl. 3, and Art. I, Sec. 8, Cl. 3 of the Constitution of the United States, all of which will be urged.

ARGUMENT

I. The Mobile harbor fee in question is a duty of tonnage prohibited by the Constitution of the United States.

The Constitution provides in Art. I, § 10, cl. 3:

"No State shall, without the Consent of Congress, lay any Duty of Tonnage".

In *Cannon* v. *New Orleans,* 20 Wall. 577, 581, this Court said:

"Whatever more general or more limited view may be entertained of the true meaning of this clause, it is perfectly clear that a duty or tax or burden imposed under the authority of the State, which is, by the law imposing it, to be measured by the capacity of the vessel, and is in its essence a contribution claimed for the privilege of arriving and departing from a port of the United States, is within the prohibition".

In *Steamship Company* v. *Portwardens,* 6 Wall. 31, 35, this Court said:

"It was not only a *pro rata* tax which was prohibited, but any duty on the ship, whether a fixed sum upon its whole tonnage, or a sum to be ascertained by comparing the amount of tonnage with the rate of duty".

In *State Tonnage Tax Cases,* 12 Wall. 204, 217-218 an Alabama statute which levied a tax on all vessels "plying in the navigable waters of the State" at "the rate of $1 per ton of the registered tonnage thereof", without regard to value, was held to be unconstitutional, and this Court said:

"• • • the tax is just what the language imports, a duty of tonnage, which is made even plainer when it

comes to be considered that the steamboats are not to be taxed at all unless they are 'plying in the navigable waters of the State', showing to a demonstration that it is as instruments of commerce and not as property that they are required to contribute to the revenues of the State".

In *Inman Steamship Co.* v. *Tinker,* 94 U. S. 238, 243, wherein a New York statute was held unconstitutional because it imposed a tonnage duty, this Court said:

"In this law of the State there are several important points that must not be overlooked. The charge is not exacted for any services rendered or offered to be rendered. If the vessel enter the port and immediately take her departure, or load or unload, or make fast to any wharf, either of these things disjunctively brings her within the act, and makes her liable to the burden prescribed.

The charge is applied wholly irrespective of the *ad valorem* principle."

The so-called harbor fee involved in the case at bar is clearly a duty of tonnage within the constitutional prohibition. It contains all the essentials of such a duty. The fee was determined by the vessel's tonnage, irrespective of value, and was charged *only* "for trips in and out of the harbor" (R. 47). It was not for specific service rendered to a partciular vessel, but a charge for "the general supervision or policing of the harbor" (Opinion, R. 60). The harbor master was right in admitting that in principle his supervision was the same as that of traffic officers in the city of Mobile (R. 50). If this "harbor fee" is a valid charge there would not appear to be any reason why appellant might not lawfully be required to pay a portion (specifically) of the expense of maintaining the Mobile police force because it patrols the waterfront.

That the fee in question was prescribed to raise money for public purposes is clear from the State Court's finding

that it was "a charge to cover the expenses of the State agency in supervising and operating the port" (R. 60). It is therefore a tax of the prohibited class, *i. e.*, a tonnage tax, because it is a fee for admission to the harbor and for use thereof by appellant's steamers (Opinion, R. 65). The fact that steamship companies are presumably benefited because Mobile harbor is supervised does not alter the nature of the charges made as being a tax for public purposes. See *Bauman* v. *Ross*, 167 U. S. 548, 589.

In *Steamship Company* v. *Portwardens*, 6 Wall. 31, 34 a Louisiana statute which allowed wardens of the port of New Orleans to charge $5, whether called on to perform any service or not, for every vessel arriving in that port, was held to be unconstitutional because it burdened interstate commerce and also because it was a duty on tonnage. This Court said:

"It may be true that the existence of such a body of men is beneficial to commerce, but the same is true of the government of the State, of the city government, of the courts, of the whole body of public functionaries. If the constitutionality of the charge for the benefit of the master and wardens can be maintained upon the ground that it secures compensation for services, it is difficult to perceive upon what grounds the constitutionality of any State law imposing taxes for the benefit of the State government upon vessels landing in its ports, can be questioned".

In *Board of Harbor Commissioners* v. *Pashley*, 19 So. Car. 315, 323, the Board sued to recover a charge of 5¢ "per foot of length over all" under a South Carolina statute authorizing the Board to fix fees to be "charged upon all vessels arriving" at Charleston. The Supreme Court of South Carolina denied recovery to the Board on the ground that the charge sued for was a tonnage duty

prohibited by the Constitution of the United States. The Court said:

"Every vessel, upon entering the port, was liable to pay such charges whether it received any service or not. Its manifest object was to provide the means of paying the officers of the State and the expenses incident to the performance of their duties, and cannot be regarded as anything more or less than as a tax to raise a revenue for that purpose; and we see no reason why, with just as much reason, the State might not levy a similar contribution upon every vessel entering the port of Charleston, for the purpose of contributing to the means necessary to pay the police who are charged with the duty of preserving order on the wharves as well as in other parts of the city; and this no one would contend for".

The prohibition in the Constitution against laying tonnage duties cannot be evaded by charging vessels as for wharfage facilities or for any service not actually rendered.

In *Cannon* v. *New Orleans,* 20 Wall. 577, Cannon sued the City to recover money which he had paid under an ordinance which fixed "levee and wharfage dues" on "all steamboats *which shall moor or land in any part of the port of New Orleans*" at a specified rate per ton if in port not exceeding five days and at $5 per day thereafter. The Supreme Court of Louisiana upheld the constitutionality of these "dues" on the ground that they were "charged as compensation for commercial facilities furnished by the city" (20 Wall. 578-579). That decision was reversed by this Court, which held the "dues" to be a tonnage tax prohibited by the Constitution and that since charged irrespective of where the vessel moored they were not compensation for use of the city's wharves.

In *City of Oakland* v. *E. K. Wood Lumber Company,* 211 Cal. 16, 292 Pac. 1076, a city ordinance, imposing

wharfage charges for use of wharves operated by the city and requiring payment of a like amount as a condition of obtaining a permit to land *at any other wharf,* was held by the California Supreme Court to be invalid because it violated the Federal Constitution. The Court said (211 Cal. at 26):

"Any imposition of such a charge on all vessels which land in the harbor, irrespective of whether they use the facilities and services furnished by the municipality when there may exist an election to do otherwise, must be held to be an impost on navigation and therefore unconstitutional. The fact that they land at some wharf within the harbor is not sufficient. The charge may only be exacted in exchange for facilities or services belonging to or furnished by the municipality imposing the charge. We can see no escape from the conclusion that the present ordinance requiring every vessel to land at the city's wharves, or, upon paying the same charge, be entitled to a permit to land at some other wharf in the city, is not a charge, as to vessels so landing elsewhere, for facilities or services furnished by the city. As to such vessels the exaction must be deemed to be a charge for the privilege merely of stopping in the plaintiff's harbor and, as such, constitutes a restriction on free commerce and navigation in violation of the constitutional prohibition".

The foregoing cases and others are discussed in an annotation in 80 A. L. R. 388-392, entitled "Imposition of wharfage or dockage fees, by state or municipality, as tonnage duty".

In *Packet Co.* v. *Keokuk,* 95 U. S. 80, 86, this Court said:

"No doubt, neither a State nor a municipal corporation can be permitted to impose a tax upon tonnage under cover of laws or ordinances ostensibly passed to collect wharfage. This has sometimes been attempted, but the ordinances will always be carefully scrutinized. In *Cannon* v. *New Orleans,* the ordinance was held invalid, not because the charge was for wharfage, nor even because

it was proportioned to the tonnage of the vessels, but because the charge was not for wharfage or any service rendered. It was for stopping in the harbor, though no wharf was used. Such, also, was *North-western Packet Co.* v. *St. Paul*, 3 Dill. 454. So, in *Steamship Company* v. *Port Wardens*, 6 Wall. 31, the statute held void imposed a tax upon every ship entering the port. This was held to be alike a regulation of commerce and a duty of tonnage. It was a sovereign exaction, not a charge for compensation. Of the same character was the tax held prohibited in *Peete* v. *Morgan*, 19 *id.* 581".

The distinction between a legitimate charge for service rendered and a tax imposed for the privilege of entering or using a port is clearly stated in *Packet Co.* v. *Keokuk*, *supra*, 95 U. S. at 84-86, and in *Transportation Co.* v. *Parkersburg*, 107 U. S. 691, 698-699.

Congress has not given its consent that the State of Alabama should lay a duty of tonnage. On the contrary, the Act of March 2, 1819, 3 U. S. Stat. 489, which enabled the People of Alabama Territory to form a Constitution and State government and provided for the admission of such State into the Union, contained in Sec. 6 the following proviso:

"That the said convention [authorized to form a constitution and state government] shall provide, by an ordinance irrevocable without the consent of the United States, * * * that all navigable waters within the said state shall forever remain public highways, free to the citizens of said state and of the United States, without any tax, duty, impost, or toll, therefor, imposed by the said state" (3 U. S. Stat. 489, at 492).

That compact became part of the organic law of Alabama. Alabama Constitution 1901, Sec. 24; Alabama Code 1923, Secs. 33, 36.

Furthermore, Congress has by general legislation prohibited the imposition of tonnage duties on vessels "trading

from one port within the United States to another port within the United States" (R. S. 4220; Title 46 U. S. C. § 122).

II. Imposition of the Mobile harbor fees on appellant's vessels engaged in interstate commerce violates the commerce clause of the Federal Constitution.

The fees sued for were for use of the harbor by appellant's ships engaged in coastwise trade between New York and Mobile (R. 22, 58, 65). Imposition of such fees directly burdens interstate commerce and violates the commerce clause of the Constitution, Art. I, Sec. 8, cl. 3, which places in Congress the power "to regulate commerce • • • among the several states".

The power of Congress is exclusive as to those subjects which require a general system or uniformity of regulation. *Minnesota Rate Cases,* 230 U. S. 352, 399. By clause 1 of Sec. 8, Art. I of the Constitution, Congress was given power to lay and collect duties, to be uniform throughout the United States. By Title 46 U. S. Code § 122 (R. S. 4220) it is provided:

"No vessel belonging to any citizen of the United States, trading from one port within the United States to another port within the United States, • • • shall be subject to tonnage tax or duty, if such vessel be licensed, registered or enrolled".

The Supreme Court of Alabama in *Harbor Master and Port Wardens of Mobile* v. *Captain Southerland,* 47 Ala. 511, recognized that harbor fees such as those here involved are contrary to the commerce clause of the Federal Constitution. That Court then said (515-516):

"If this act, and the said ordinance passed by the city authorities of Mobile, really mean that every steamer or

sailing vessel that comes into the bay and harbor of Mobile for the purpose named in said ordinance, must pay the fees therein specified, whether the services of the harbor master and port wardens, or either of them, become necessary, or not, and when no services are in fact rendered then we are prepared to pronounce the said act and ordinance unconstitutional. If no other reasonable construction can be given to said act and ordinance, then they amount to a regulation of commerce, and are in conflict with the constitution of the United States on this subject. *Steamship Company* v. *Port Wardens,* 6 Wall. 31".

In *Steamship Company* v. *Portwardens,* 6 Wall. 31, 33 this Court, condemning a statutory fee of $5 in favor of port wardens as unconstitutional because contrary to the commerce clause, said:

"That the act of the legislature of Louisiana is a regulation of commerce can hardly be doubted. It imposes a tax upon every ship entering the port of New Orleans, to be collected upon every entry. In the case of a steamer plying between that port and ports in adjoining States of Alabama or Texas, it becomes a serious burden, and works the very mischief against which the Constitution intended to protect commerce among the States".

In *Harman* v. *Chicago,* 147 U. S. 396, 407 a city ordinance imposing a license tax for the privilege of navigating the Chicago River on steamtugs licensed by the United States authorities, was held to be unconstitutional because it conflicted with the exclusive power of Congress to regulate interstate and foreign commerce. The City argued that the license fee was for benefits conferred by the City in providing an improved waterway. Rejecting this argument, the Court said (411-412):

"The license fee is a tax for the use of navigable waters, not a charge by way of compensation for any specific improvement. The grant to the city under which the ordinance was passed is a general one to all municipalities

of the State. Waters navigable in themselves in a State, and connecting with other navigable waters so as to form a waterway to other States or foreign nations, cannot be obstructed or impeded so as to impair, defeat or place any burden upon a right to their navigation granted by Congress."

In *Helson and Randolph* v. *Kentucky*, 279 U. S. 245, a Kentucky statute, imposing a tax on gasoline purchased outside but used inside the State as fuel on a ferry engaged in interstate commerce, was held to contravene the commerce clause. This Court said (248-249):

"Regulation of interstate and foreign commerce is a matter committed exclusively to the control of Congress, and the rule is settled by innumerable decisions of this Court, unnecessary to be cited, that a state law which directly burdens such commerce by taxation or otherwise, constitutes a regulation beyond the power of the state under the Constitution."

And further, at 252:

"The statute here assailed clearly comes within the principle of these and numerous other decisions of like character which might be added. The tax is exacted as the price of the privilege of using an instrumentality of interstate commerce. It reasonably cannot be distinguished from a tax for using a locomotive or a car employed in such commerce. A tax laid upon the use of the ferry boat, would present an exact parallel. And is not the fuel consumed in propelling the boat an instrumentality of commerce no less than the boat itself? A tax, which falls directly upon the use of one of the means by which commerce is carried on, directly burdens that commerce."

See also *People* v. *Compagnie Generale Transatlantique*, 107 U. S. 59; *Foote* v. *Maryland*, 232 U. S. 494; *Cooney* v. *Mountain States Tel. Co.*, 294 U. S. 384, 392.

The decisions cited govern the case at bar. Appellant's ships were instrumentalities of interstate commerce and

as such are immune from the tax imposed by appellee for the privilege of using Mobile harbor. Whether the harbor fee in question be considered a tonnage tax or a license tax, it is a direct burden on interstate commerce and invalid.

CONCLUSION

IT IS RESPECTFULLY SUBMITTED THAT THE JUDGMENT OF THE SUPREME COURT OF ALABAMA SHOULD BE REVERSED WITH COSTS AND ENTRY OF JUDGMENT DIRECTED IN FAVOR OF APPELLANT, WITH COSTS.

ROSCOE H. HUPPER
ALEXIS T. GRESHAM
WILLIAM J. DEAN
Counsel for Appellant

New York City
September 30, 1935

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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

NO. 43 OCTOBER TERM, 1935

CLYDE MALLORY LINES

Appellant

vs.

STATE OF ALABAMA, ex rel. STATE DOCKS COMMISSION

Appellee

ON APPEAL FROM SUPREME COURT OF ALABAMA

BRIEF FOR APPELLEE

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SUPREME COURT OF THE UNITED STATES

Clyde Mallory Lines

Appellant.

vs.

State of Alabama, ex rel, State Docks Commission

Appellee.

No: 43
October Term
1935

BRIEF FOR APPELLEE

PRELIMINARY STATEMENT

This appeal is taken for the purpose of testing the constitutionality of a harbor fee of $7.50 on vessels 500 tons and over at the Port of Mobile, levied by State Docks Commission, an arm of the State of Alabama, "for the purpose of meeting the expense attendant upon the supervision of the port and execution of the regulations and providing for the proper accommodation of vessels at this Port".

It is not questioned by appellant that the fees sued for were used for the protection of shipping in Mobile Harbor, including appellant's ships, that they had the benefit of the services rendered by the Commission, nor that the charges were reasonable for the service named in the order of the commission.

Attention is called to the fact that appellant seeks to establish the purpose of the harbor fee by the opinion of a mere subordinate, (the harbor master), rath-

er than by the resolution establishing it and the statutes and harbor rules applicable thereto.

Appellee does controvert the statement of defendant's witness that "there was no service whatsoever rendered defendant's vessel, or any one of them, for which these charges are being made, and attention is called to the witness' clarification of his testimony by saying no service was rendered on them." (R. 51).

PECULIAR LOCAL CONDITIONS

The Harbor of Mobile is but a narrow ribbon known as Mobile River (approached by a narrow dredged channel) the heart of which is the restricted area between Cochrane Bridge and the Bay. Here vessels of every character pass and repass, anchor, load and unload; are menaced by the movements of each other while affected by wind and tide, by improper anchorage and loading and unloading, by fire from the unloading of oil, gasoline and other combustibles, by the discharge of such combustibles into the harbor; and by obstructions such as rafts and flat boats placed within the narrow bounds of the harbor.

The Harbor Master testified, (Record 39-50,) that:

The principal anchorage for vessels is from Dauphin Street in Mobile River up about four miles to Old Government Oil Dock;

That it is a narrow river, this inner harbor, averaging in width from bank to bank, from 700 feet to 1,000 feet, the navigable channel being only 500 feet up to State Docks and only 300 feet above;

That there are industries or other improvements on both sides, some having slips for vessels to enter, such as dry docks and ship building plants (6), Turner Terminals, State Docks, public docks, refining companies, coal tipples and many other industries used by vessels coming in port;

That all Clyde-Mallory vessels coming in this port exceed 500 tons capacity;

That vessels coming into port vary from 150 feet to 550 feet in length, and such vessels coming out of slips from either side must have a clear way into the dredged channel;

That there is danger of collision between vessels moving up or down the channel with those coming from slips or swinging from alongside wharfs; that vessels should be anchored in the proper place with room to swing, and a high tide with the wind might swing the ship across the river, and unless there was some method or rule to make those ships anchor and run a line ashore they would swing around with the tide and close the channel ,and that supervision of anchorage of vessels is in him;

That supervision over the port is necessary to avoid collisions of that kind and to see that vessels coming into port do not endanger other shipping by discharging oil or gas on the waters of the harbor, to avoid dangers to shipping in port from obstructions such as logs, rafts, barges or anything of that kind and from improper anchorage of a vessel;

That constant supervision over the port in all of these ways is necessary for the safety and protection

of all vessels in port, and that he has never known of any agency for the protection of shipping from these sources other than the harbor master and his predecessor the chief wharfinger, and that it devolved upon him to do these things and he does them by virtue of the rules and regulations formulated and put in force by the State Docks Commission; and that he has been called upon at various times to exercise that supervisory duty, including appellant;

That hazards of a port increase in proportion to growth of traffic, that there are now more ships, and that the larger the ships naturally the more danger there is and the greater the danger to other shipping;

Exhibit F to Captain Smith's testimony, (Record 44), is a letter from the Mobile agent of the Clyde-Mallory Lines to said Harbormatser, stating that said agent had been approached by several of their captains as to the lack of clearance for vessels to pass the Dredge San Diego and her pipe line now operating on the lower river "with hopes that you will be able to have it rectified in order to avoid any accident"; and Exhibit G (Record 45) is a letter from the Master of one of the Clyde-Mallory vessels, calling attention to the same encroachment, "the ship passing having to hug the dock too closely and making it hard to avoid hitting same with the stern when getting back into the river again. Coming up it is bad; must be worse swinging on starboard wheel, bound out."

The Witness C. E. Sauls testified: (Record 50) that he is assistant General Manager at the State Docks, and before occupying that position was engineer for five or six years with supervision of the Port, the har-

bormaster and assistants, and that for the safety of shipping in the Port of Mobile he considered it very essential that the use of the harbor for shipping be regulated.

STATUTORY PROVISIONS

For the protection and benefit of shipping in port the Legislature made it the duty of the State Harbor Commission (now State Docks Commission) to perform certain services specified in the legislative acts or in regulations by them authorized. These services are important and valuable to every vessel that enters the port, and are not required as mere subterfuges upon which to base a charge against vessels.

These provisions are contained in Chapter 44 of the Code of Alabama of 1923, Sections 2427 et seq. and in the Rules and Regulations for the Port of Mobile.

Section 2433 of the Code provides for the appointment of the Chief Wharfinger, Deputy Wharfinger, and other employees.

Section 2434 gives jurisdiction to the Port over the waters and shores of Mobile Bay, Mobile River and tributary streams in which the tide ebbs and flows.

Section 2438 provides that

"The Board may make all reasonable rules and regulations as to where vessels shall be moored and where vessels shall be placed, and for the shifting and mooring of vessels."

Section 2455 makes it the duty of the Chief Wharfinger to

"regulate the positions of vessels in the docks and harbor, and cause them to be removed from time to time, and from place to place, as the general convenience, safety and good order may require. . . . He may require vessels to accommodate other vessels as the circumstances warrant."

Section 2459 provides that

"The Chief Wharfinger must require all wharf owners, dock companies, ship masters, consignees, pilots and masters of tow boats to conform to the regulations of the Board. He must require the harbor, docks, slips, wharves, piers, and other premises under the jurisdiction of said Board to be kept free of all obstructions, and when parties fail to obey his orders to remove the same, he must forthwith report the fact to the Board, and execute their orders in relation thereto."

Section 2478 provides that

"The Board shall regulate the handling of the rafts and the character of rafts within the limits of its jurisdiction and may also regulate the anchorage, berthage, and moorage of steamboats, or other water craft."

Section 2490 provides that

"The Chief Wharfinger shall execute and enforce the rules and regulations which may be established by said Board of State Harbor Commissioners pursuant to the provisions of this Article."

Section 2 of the Act of 1923 creating State Docks Commission (Acts 1923 page 330) vests the said Commission with all the foregoing powers duties and authority in language following:

"There is hereby created a board or body in lieu of the present State Harbor Commission, which Commission is hereby abolished, the new board to be known as the State Docks Commission . . . which Commission, in addition to the duties herein more particularly specified, shall be vested with and shall exercise the powers, duties and authority **now** vested in and exercised by the present State Harbor Commission which are not in conflict herewith."

Section 1 of the State Docks Act approved January 17, 1927 provides that the authority and powers conferred upon the Commission by the Act of 1923, among other, of "operating all harbors and seaports within the State . . . are hereby continued."

Section 3 of the Same Act, extends the jurisdiction of the Commission over Mobile Harbor and all streams flowing into such harbor in which the tide ebbs and flows.

Section 9 of the same act provided that:

"The operation of all harbors and seaports within the State and the improvements and facilities hereby authorized shall be conducted in the name of the State Docks Commission . . . The Commission may adopt rules not inconsistent with the provisions of this Act for the purpose of regulating, controlling and conducting the said operation."

Section 18 of the same Act provides that:

"The said Commission is hereby authorized to formulate and promulgate rules and regulations for the operation of any seaport or harbor within the State."

HARBOR RULES

Port and Harbor Rules adopted pursuant to the above statutory provisions, a copy of which is attached to the complaint, 17 in number, not counting pilotage rules not pertinent to the issues, impose upon the Chief Wharfinger (and Deputy Wharfinger) the performance of many varied services in behalf, and for the protection, of shipping within the Harbor, which may be summarized as follows: (Record 3-8, 23-28, 32-38)

Rule 1. Requires vessels on arrival to take in gib-booms and out-riggers and take anchors on when not in use;

Rule 3. Charges the Chief Wharfinger with the duty of selecting and changing anchorages, with movements of vessels into and out of slips and berths, and with all other ship movements that affect a fair joint use of the facilities of the Port;

Rule 4. Requires vessels arriving to receive or discharge cargo and moor on a line parallel with the channel of the River; and all vessels to be on the same line and all vessels to be moored at both ends with anchors sufficient to hold them in line, under the Wharfinger's directions;

Rule 5. Requires him to see that all lighters, barges, timber, rafts, or similar floating objects placed alongside vessels, etc., must be so placed as to not unnecessarily obstruct navigable water and must be made fast securely at both ends to prevent swinging and to have suitable lights at night;

Rule 6. Requires him to see that no vessel in the channel shall be allowed to make fast a line ashore except in emergency;

Rule 7. Requires him to see that no vessel is allowed to receive or discharge cargo while anchored in the River below Cochrane Bridge without permission;

Rule 9. Requires him to see that channel is kept clear to permit vessels to leave the Harbor;

Rule 10. Requires him to see that no vessel exceeds a safety speed limit in Mobile River;

Rule 11. Requires him to give vessels maximum draft to which they can be safely loaded;

Rule 12. Requires him to see that vessels in slips at Dry Docks do not project beyond the Harbor Line.

Rule 13. Requires him to see that vessels must not be berthed more than two abreast at margin of wharves, etc.;

Rule 14. Requires him to see that a vessel lying alongside a marginal wharf must heave anchors up to hawse pipes;

Rule 15. Forbids the shifting of any vessel or change of its anchorage without assistance of a Deputy Wharfinger and outlines the duties of the Chief Wharinger in relation thereto;

Rule 17. Makes it his duty to see that no steamship, oil tanker, barge or other vessel within the waters of the harbor shall cast or discharge into the waters of the Harbor any oil or oily mixtures; that no such vessel carrying fuel oil shall pump bilges containing oil mixtures into the waters of the Harbor; and further requires him or his deputy to seal the discharge and bilge valves of vessels.

It is manifest that the State of Alabama and its Executive Arm, the State Docks Commission, by enacting the foregoing stringent protective statutes and rules, recognized the existence of many local hazards peculiar to shipping in the Port of Mobile, and sought

thereby to make the Port safe and attractive to vessels in the coastwise and foreign trade. And the language of this Honorable Court, as applied to similar though far less stringent requirements of another port, are peculiarly applicable to those of the Port of Mobile:

"The duties thus imposed upon the harbormaster, if faithfully discharged, must, it must be conceded, materially advance and not obstruct or burden the trade and business on the Mississippi River, especially at the Port of St. Louis. Services rendered by him in the execution of those duties **would be in aid,** and not a hindrance, **to commerce and navigation."**

N. W. Packet Co. v. St. Louis 100 U.S. 423, 427; 25 L. Ed. 689

Having imposed these onerous duties and services upon State Docks Commission, through its harbormaster and other agents, the Legislature provided in part as is contained in Section 2443 of the Code of Alabama, and being a part of Chapter 44, as follows:

"The Board may make and collect suitable charges for the performance of any services rendered under the authority given in this chapter."

All of the foregoing statutory provisions and Harbor Rules provide primarily for services to be rendered vessels collectively and individually well within the power of the State to provide for the police regulation of the port. They provide for police regulation peculiar to the local conditions of this port. They are not of such character as could be provided under national supervision for all ports.

Some of the services required of the wharfinger, now harbor-master, and his assistants are of such

character as that a charge for these specific services can be made, such as the shifting of a vessel; but most of them are vital to the safety of each and every vessel in port, the only suitable charge for which is the charge against a vessel designated as a harbor fee. It is in no sense a tonnage tax, but is a charge in aid of the Police Powers of the State to protect shipping.

These services enure to each vessel entering the harbor as fully as those requiring the harbormaster to walk the deck of such vessel.

Vessels having their situs in the Port are required to carry their part of the burden by payment of customary licenses and taxes.

The purpose for which the harbor fee (and other port charges) was laid, is clearly expressed by the Minutes of the Meeting of the Commission held February 25th, 1924, as follows:

"General Sibert presented to the Commission for consideration a schedule of charges to be collected by the State Docks Commission for Harbor Fees for the purpose of meeting the expense attendant upon the supervision of the Port and execution of the regulations and providing for the proper accommodation of vessels at this Port, ... effective March 1st, 1924, as follows:"

The resolution and schedule of fees are shown on pages 23-24 of the record; the fee involved in this case being the item of $7.50 on vessels of 500 tons and over.

CONSTRUCTION OF STATE STATUTE

The Supreme Court of Alabama, in a well considered opinion in this case, has definitely sustained

the authority of the Docks Commission, under State Statutes, to impose this charge of $7.50, and the only question before this Honorable Court is whether or not it is in violation of the Constitution of the United States. In an able and illuminating opinion by Justice Bouldin, the Alabama Court holds that it is not; and after reviewing the powers and duties of the Commission, says:

"The authority and duty of the state to make proper harbor regulations suited to local conditions and to actively supervise or operate the harbor in accordance with such regulations, in the absence of action by Congress, are now fully settled; that this must entail expense is obvious; that such service is not a hindrance to, but in aid of, shipping, is clear.

"The question, then, resolves itself into the simple inquiry; Does the Constitution of the United States contemplate that such service shall be rendered at the expense of the taxpayers or covered by some special fee not applicable to all ships which share the benefits of the service? We think not.

"It is not questioned that the fees sued for were for the use of the harbor by appellant's ships in the conduct of the shipping business; that they had the benefit of the services outlined above; that the charges were reasonable for the service named in the order of the Commission."

Clyde Mallory Lines vs State ex rel State Docks Commission - 229 Ala. 624, 159 Sou. 53.

For convenient reference, the entire opinion of Alabama Court in the foregoing case, is printed as an appendix to this brief.

The construction given to a statute of a state by the Supreme Court of such state is binding on the

Supreme Court of the United States;

Cleveland Trust Co. v. Lander 184 U.S. 111, 46 L. Ed. 456.

Louisville & Nashville R.R. Co. v. Kentucky 183 U.S. 503-7; 46 L. Ed. 298-302.

Des Moines Nat. Bank v. Fairweather, 263 U.S. 103 68 L. Ed. 191.

TONNAGE TAX OR POLICE REGULATION

Early and leading cases on these diverse subjects are the "State Tonnage Tax Cases" arising in the port of Mobile and are entitled Jessie J. Cox et al. vs. Elisha B. Lott, 12 Wallace 204, and the Mobile Trade Company vs. Elisha B. Lott, 12 Wallace 221.

The State of Alabama had passed a **revenue act** among other things levying a tax on vessels, "at the rate of $1.00 per ton of the registered tonnage thereof." This Act was attacked as being in violation of Paragraph 3, Section 10, Art. I of the U. S. Constitution and the Court properly so held.

But in doing so the Court upheld the right of states to enact inspection laws under its Police Powers, using the following language:

"Taxes in aid of the inspection laws of a State, under special circumstances, have been upheld as necessary to promote the interests of commerce and the security of navigation. Cooley vs. Port Wardens, 12 How., 314.

"Laws of that character are upheld as contemplating benefits and advantages to commerce and navigation, and as altogether distinct from imposts and duties on imports and exports and duties of tonnage. Usage, it is said, has sanctioned such laws where Congress

has not legislated, but it is clear that such laws bear no relation to the Act in question, as the Act under consideration is emphatically an Act to raise revenue to replenish the treasury of the State and for no other purpose, **and does not contemplate any beneficial service for the steamboats or other vessels subjected to taxation.**" Emphasis supplied.

Cox vs. Lott, 12 Wallace 221, 20 L. Ed. 375.

The distinction between the police power and the taxing power is clearly brought out in Corpus Juris, in discussing "Constitutional Law," as follows:

"The police power must be distinguished from the taxing power, and the distinction is this: The taxing power is exercised for the purpose of raising revenue and is subject to certain limitations elsewhere considered, while the police power is exercised only for the purpose of promoting the public welfare, and, although this end may be attained by taxing or licensing occupations, yet the object must always be regulation and not the raising of revenue, and hence the restrictions on the taxing power do not apply."

12 Corpus Juris, 906, Section 414.

The case of Cooley vs. Port Wardens referred to by the Court in the Cox vs. Lott case, is a leading case on the question of the power of the States to enforce police regulations appropriate to local conditions which will affect commerce.

In that case the State of Pennsylvania had passed an Act making it compulsory on all vessels of 75 tons burden to receive a pilot and with provision that if a pilot be not taken the vessel should be liable for a sum equal to one-half the politage fee.

The Act was contested on the ground that is was re-

pugnant to the second and third sections of said Section 10, Art. I of the Constitution.

Justice Curtis delivered the opinion of the Court stating among other things on page 1002, 13 L. Ed. as follows:

"We think this particular regulation concerning half pilotage fees is an appropriate part of a genaral system of regulations of this subject. Testing it by the practice of commercial states and countries legislating on the subject, we find it has usually been deemed necessary to make similar provisions."

And on page 1006 as follows:

"We are of opinion that this state law was enacted by virtue of a power, residing in the State to legislate; that it is not in conflict with any system which Congress has established by making regulations, or by intentionally leaving individuals to their own unrestricted action; that this law is therefore valid, and the judgment of the Supreme Court of Pennsylvania in each case must be affirmed."

Cooley vs. Port Wardens, 12 How. 299, 13 L. Ed. 996, 1005; h.n. 3

In the case of Gibbons vs. Ogden, Chief Justice Marshall in an able and comprehensive opinion, upholds the right of the Federal Government to regulate commerce under paragraph 3 of Section 8, Art. I of the Constitution, providing that

"Congress shall have the power—3, To regulate commerce with foregin nations, and among the several states ,and with the Indian tribes;"

but in so doing, expressly recognized the police power of States to enact inspection laws; and in discussing the restrictions upon the power of the States said:

(P. 71) "That inspection laws may have a remote and considerable influence on commerce, will not be denied; but that a power to regulate commerce is the source from which the right to pass them is derived, cannot be admitted. . . . They form a portion of that immense mass of legislation which embraces everything within the territory of a State not surrendered to general government; all of which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike roads, ferries, etc. are component parts of this mass."

Gibbons vs. Ogden, 9 Wheaton 1; 6 L. Ed. 1, 71-72

In Morgan Co. vs. Louisiana, the Louisiana laws imposing quarantine fees were being contested, upon the grounds, first, that "they are null and void because they impose tonnage duties," second, they "impose on vessels the cost of a system created for the benefit of a whole community; and third, "unless the sum imposed on the vessel is for a **direct service to the vessel** proportioned to the amount claimed it is repbrobated tonnage duty." And these are the same grounds being raised in opposition to the harbor fees now in question.

The law was upheld. And in doing so Justice Miller further said:

"2. But, aside from this, quarantine laws belong to that class of state legislation which, whether passed with intent to regulate commerce or not, must be admitted to have that effect, and which are valid until displaced or contravened by some legislation of Congress.

"The matter is one in which the rules that should govern it may in many respects be different in differ-

ent localities, and for that reason be better understood and more wisely established by the local authorities. The practice which should control a quarantine station on the Mississippi River, a hundred miles from the sea, may be widely and wisely different from that which is best for the Harbor of New York. In this respect the case falls within the principles which governed the case of Wilson vs Blackbird Creek Marsh Co. 2 Pet. 245 (27 U. S. Bk. 7 L. Ed. 412); Cooley vs Board of Wardens, 12 How. 299 (53 U. S. Bk. 13, L. Ed. 996); Gilman vs Phila. 3 Wall. 727 (70 U. S. Bk. 18, L. Ed. 96); Pound vs Turck, 95 U. S. 462 (Bk. 24 L. Ed. 525); Hall vs DeCuir, 95 U. S. 488 (Bk. 24, L. Ed. 548); Packet Co. vs Catlettsburgh, 105 U. S. 562 (Bk. 26 L. Ed. 1170); Transportation Co. vs Parkersburg, 107 U. S. 702, (Bk. 27 L. Ed. 588); Escanaba Co. vs Chicago, 107 U. S. 678 (Bk. 27 L. Ed. 442):"

Morgan Co. vs Louisiana, 118 U. S. 455, 30 L. Ed. 237, 242.

In the case of Cincinnati Co. vs. Board of Trustees there was involved the question of penalties imposed for refusal to obey the rules for places of landing, and the orders of the wharfmaster on that subject, as being taxes on tonnage. The opinion of Justice Miller is aptly stated in the fourth head note of the case as follows:

"4. Appropriate regulations prescribing places for the landing of vessels and placing the matter under the control of a wharfmaster or other officer, whose duty it is to look after it, are valid and constitutional, and the States may prescribe them until Congress assumes to do so."

(P. 1171) "Such rules and regulations and such an officer exist in every place where the number of the inhabitants or the amount of the water-borne commerce justifies or requires it. The necessity for the

existence of this power cannot be doubted. We are not aware that in any instance Congress has attempted to exercise it. If it be a regulation of commerce under the power conferred on Congress by the Constitution, that body has signally failed to provide any such regulation. It belongs, also, manifestly, to that class of rules which, like pilotage and some others, can be most wisely exercised by local authorities, and in regard to which no general rules, applicable alike to all ports and landing places, can be properly made. If a regulation of commerce at all, it comes within that class in which the States may prescribe rules until Congress assumes to do so. Cooley vs Board of Wardens, 12 How., 299; Gilman vs Philadelphia, 3 Wall., 727 (70 U. S. XVIII., 100); Crandall vs Nevada 6 Wall., 42 (73 U. S. XVIII., 746); Pound vs Turck 95 U. S. 462 (XXIV., 526)."

Cincinnati Co. vs Board of Trustees, 105 U. S. 559, 26 L. Ed. 1169.

In the foregoing case the wharfage charge was sought to be equitably apportioned by charging $1.00 per vessel over 100 tons and 50 cents per vessel under 100 tons; and it was contended this constituted a specific tax on tonnage. But this Honorable Court then held that:

"It is no objection to the ordinance fixing the amount of this compensation that it was measured by the size of the vessel, and that this size was ascertained by the tonnage of each vessel. It is idle after the decisions we have made to call this a tax on tonnage."

This ruling is directly applicable to the case now before the Court.

TAX—TAXATION

The terminology of the resolution fixing the harbor

fee places the charge neither "upon", nor "against" vessels of dimensions indicated, nor does it undertake to declare a lien the usual incident of a tax, upon vessels. The statutes under which the Docks Commission acted do not declare a lien for such charges and make no provision for enforcement against the vessel. It is in no sense a tax, and is collectible like any other charge against owner and charterer.

The resolution merely fixes "a schedule of charges to be collected by the State Docks Commission for Harbor Fees for the purpose of meeting the expense attendant upon the supervision of the Port and execution of the regulations and providing for the proper accomodation of vessels at this port." In the light of conditions prevailing in this port the charge is both reasonable and necessary; and the evidence shows that the same charge prevails in other ports.

Appellant, by iteration and reiteration, would drug the mind of the Court into accepting as true its claim that the charge in question is a tax for revenue and a tax on tonnage.

A service charge, as in the instant case, is not made a tax within the meaning of the Constitution because it may or does affect commerce. The books abound with decisions to the contrary, among others, the case of Morgan Co. vs. Louisiana 118 U. S. 455 (30 L. Ed. 227). Legislatures, Courts and even the common mind, have a fairly accurate idea of what constitutes a tax, and the difference between a tax and a charge for performance of services required by law.

The term taxes as used in the federal constitution

must be confined to the idea which they commonly and ordinarily present to the mind as exactions to fill the public coffers for the payment of debts and promotion of the general welfare of a country.

Worsley vs. New Orleans, 41 Amer. Dec. 333,

Taxes are defined to be burdens or charges imposed by the Legislative power upon persons or property to raise money **for public purposes.**

8 Words and Phrases "Tax-Taxation" p. 6867 and numerous citations.

Taxes are defined as being the enforced proportional contribution of persons and property, levied by authority of the State for the support of the government and for all public needs.

Ibid, page 6868 and numerous citations on that page.

This honorable Court has defined a tax as follows:

"A tax, says Webster's Dictionary, is a rate or sum of money assessed on the person or property of a citizen by government for the use of a nation or state. 'Taxes are burdens or charges imposed by the legislature upon persons or property to raise money for public purposes; Cooley Const. Lim. 479. Coulter J. in Northern Liberties vs. St. John's Church, 13 Pa. St. 104, says, very forcibly, I think, the common mind has every where taken in the understanding that taxes are a public imposition, levied by authority of the government for the purpose of carrying on the government in all its machinery and operations—that they are imposed for a public purpose.

Savings Assn. vs Topeka 22 L. Ed. 455, 461, 20 Wall 655.

In Morgan Co. vs. Louisiana the steamhisp company contended that quarantine fees constituted a tonnage tax, a regulation of commerce, etc. The Court had this to say:

"In all cases of this kind it has been repeatedly held that when the question is raised whether the state statute is a just exercise of state power, or is intended by roundabout means to invade the domain of federal authority this Court will look into the operation and effect of the statute to discern its purpose. . . . In the present case we are of opinion that the fee complained of is not a tonnage tax; that, in fact it is not a tax within the true meaning of that word as used in the Constitution, but is a compensation for a service rendered." 118 U. S. 455, (30 L. Ed. 237-241.)

We submit that the appellant's contention that the charge in question is a tax for revenue is not sustained either by the resolution imposing it or by its practical operation. As we see it, the sole purpose of its imposition is that expressed in the resolution imposing it, and that without such imposition, shipping entering this port would do so at its peril.

In the instant case there is not the slightest suggestion that the Harbor fees in question yielded anything in excess of the cost of the services rendered, or that its purpose was to raise revenue.

The fact that the fees in question do not yield more than sufficient to cover the cost of the services rendered, considered in connection with the expressed purpose of the Commission's resolution in fixing the charges, demonstrates that the State through its said agency was not exercising its taxing power, which it

could not delegate, but was acting solely in the exercise of its police power.

In the case of State v. Schofield, the Supreme Court of Louisiana had before it the kindred question of whether or not a license fee to do business had been imposed for regulation or revenue; and it quotes with approval from Judge Cooley's Work on Taxation, page 589, in part as follows:

"A fee for the license may still be exacted, but it must be such a fee only as will legitimately assist in the regulation, and it should not exceed the necessary or probable expense of issuing the license and of inspecting and regulating the business which it covers .... Moreover, in fixing upon the fee, it is proper and reasonable to take into account, not the expense merely of direct regulation, but all the incidental consequences that may be likely to subject the public to cost in consequence of the business licensed."

Continuing, the Louisiana Court said:

"Accepting the foregoing statements of what the law is on this point as being authoritative, we have to consider whether the license we are dealing with in this case is (in the words of Judge Dillon) 'plainly imposed for the sole or main purpose of revenue,' or, in other words, whether it goes beyond providing for the expense of the direct regulation of the business in question, together with that of (to use the expression of Judge Cooley) 'all the incidental consequences that may be likely to subject the public to cost in consequence of the business licensed.' "

State vs Schofield - 136 La. 702

Having thus pointed out the distinction between the taxing and the police power of the State, the Louisiana Court, in the above cited case, found that the fee

in question was levied under an act that not only purported to be but was an exercise of the taxing power of the State. While in the case now before this Honorable Court the resolution of State Docks Commission of Alabama expressly recites the levy to be for "the purpose of meeting the expense attendant upon the supervision of the Port and the execution of the regulations and providing for the proper accommodation of vessels at this Port". And, as stated by Judge Cooley, in fixing the harbor fee in question, it was "proper and reasonable to take into account, not the expense merely of direct regulation, but all the incidental consequences that may be likely to subject the public to cost" in connection with that supervision and regulation.

In the light of these principles and applicable statutory provisions, the Supreme Court of Alabama in this case found that:

"The evidence well supports a finding that the harbor fee in question is not a tax imposed for the privilege of entering the port, a tax on the privilege of navigation upon the navigable waters, but a charge to cover the expenses of the State agency in supervising and operating the port so that ships may enter and depart from the port in safety and without unnecessary delay; an expense of facilitating navigation, promoting commerce. It is not claimed that the schedule of fees, nor the particular fee in question, is excessive, if permissable for the purposes mentioned."

CONCLUSION

We respectfully submit that the judgment of the Supreme Court of Alabama should be affirmed.

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Attorneys for Appellee

APPENDIX

THE STATE OF ALABAMA - - - JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1934-35.

1 Div. 822.

Clyde-Mallory Lines

v.

State of Alabama, ex rel

State Docks Commission,

Appeal from Mobile Circuit Court

BOULDIN, J.

The State of Alabama, on the relation of the State Docks Commission, brought suit against Clyde Mallory Lines to recover a sum alleged to be due for "Harbor Fees" prescribed by order of said commission.

By such order the commission fixed a schedule of "Harbor Fees for the purpose of meeting the expense attendant upon the supervision of the Port and execution of the regulations and providing for the proper accomodation of vessels at this Port."

This schedule included the following:

"Vessels under 500 tons - making weekly trips, $2.50
Vessels under 500 tons, 5.00
Vessels 500 tons and over, 7.50"

Clyde Mallory lines operates ships in the coast-wise

trade between New York and Mobile, all over 500 tons, registered tonnage.

The demand sued for covers items accruing wholly under the schedule of "Vessels, 500 tons and over, $7.50."

Special fees are scheduled for "shifting" and "mooring" of vessels.

This harbor fee of $7.50, under the evidence, as well as the tenor of the above order, is a charge against each vessel of that class entering the harbor in the conduct of its shipping business.

This charge is challenged as in violation of two provisions of the Constitution of the United States. First, that it lays a "duty of tonnage" forbidden to any State, without the consent of Congress. Art. 1, Sec. 10, Clause 3. Second, that it imposes an unlawful burden on interstate commerce, and violative of Art. 1, Sec. 8, Clause 3.

The State Docks Commission is a State agency created in 1923. - —Acts 1923, page 330. Among its duties and powers is the contruction and operation of State docks, terminals, and other facilities, in aid of commerce and shipping through the Port of Mobile, a State project authorized by constitutional amendment. This function is not here involved.

The State Docks Commission was also created in lieu of a State Harbor Commission, and vested with the powers and duties theretofore pertaining to the State Harbor Commission under Chapter 44 of the Code of 1923, Section 2727, et seq.; Acts of 1923, page 330, Section 2.

By an Act of January 17th, 1927 (Acts 1927, page 1), the functions and powers of the State Docks Commission were further defined.

The jurisdiction of the commission extends over the waters and shores of Mobile River and its tributaries to the head of tidewater, and to the outer bar of Mobile Bay.—Code, 2434; Acts 1927, page 1, Section 3.

The State Docks Commission is charged with the "operation" of the harbor and seaport, and empowered to "adopt rules not inconsistent with the provisions of this Act for the purpose of regulating, controlling and conducting the said operation." - Acts 1927, pages 8, 13 and 14, 9 and 18.

The commission is authorized to "fix from time to time reasonable rates of charges for all services and for all improvements and facilities provided under the authority of this Act." - Acts 1927, page 12, §14. See also, Code §2443.

The State Docks Commission did adopt and promulgate in 1924, and re-adopt in 1927, rules and regulations, 17 in number, deemed by the commission best adapted to conditions in that harbor.

The inner harbor is defined as beginning at Beacon 40 located in the bay, some two miles out from the mouth of Mobile River, and extends up the river and tributaries to the head of tidewater, a distance of some four miles above the mouth of Mobile River.

The busy shipping zone is in the lower stretches of

the river, which is 800 to 1000 feet in width. The dredged channel for navigation is 500 feet in width up to the State Docks, and then narrows to 300 feet.

A synopsis of the rules and regulations above-mentioned will appear in the report of the case.

Suffice to say here, they look to the safety of vessels, and the dispatch of shipping business in the port. For such purpose an active and continuous harbor-master service is provided through a Chief Wharfinger and his deputies.

The supervision thus provided and shown by evidence to be necessary covers services properly referable to "mooring" and "shifting" of vessels for which a special fee is fixed.

But supervision extends to keeping the channel clear, not only by the placement of ships and their proper anchorage, but by controlling rafts, etc.; and protection against fire from the discharge of oils on the waters.

These services may be said to inure to each vessel which enters the harbor and comes within the zone where such supervision affords protection.

Other regulations and the active supervision required to assure their observance constitute a more direct service to each ship.

Each ship is required to notify the harbor master of its arrival; the pilot is required to furnish the ship-master with a copy of the harbor rules and regulations, and on entering the harbor there is a continuing duty on the State agents to see that the speed

rules are observed, and that all ships and craft accommodate their movements so as to effect a fair joint use of the facilities of the port.

The evidence well supports a finding that the harbor fee in question is not a tax imposed for the privilege of entering the port, a tax on the privilege of navigation upon the navigable waters, but a charge to cover the expenses of the State agency in supervising and operating the port so that ships may enter and depart from the port in safety and without unnecessary delay; and expense of facilitating navigation, promoting commerce. It is not claimed that the schedule of fees, nor the particular fee in question, is excessive, if permissible for the purpose mentioned.

It may be truly said the general supervision or policing of the harbor to maintain conditions of safety therein in all kinds of weather is for the benefit of the shipping public. But this is true because of service to each ship, as a part of the shipping public. We can discern no difference in principle between a service rendered to the ship on its arrival, and that rendered in advance to make the harbor safe to enter on it arrival. The outlay for such service goes to the protection of the ship while in the harbor, and to facilitate its movements therein. The outlay is not for making of rules and regulations, but for the expenses of a personnel and an equipment of harbor craft to actively "operate" the harbor, to use the wording of the statute, under and in accordance with such necessary regulations. We cannot question that each and every ship shares in this service.

In measuring the benefits so conferred, the classi-

fication of ships according to size, "500 tons and over," at one rate, and under "500 tons" at a lower rate, would seem to be unobjectionable, but rather in keeping with the general purpose to make the charges proportionate to the benefits received.

In this connection, special fees for "mooring" and "shifting," chargeable to ships who receive such service, would not seem to bar a separate charge for servces common to all ships. To make special fees yield an income to meet the expense for the services here shown, would we think, unfairly burden vessels receiving these special services, while others sharing in the benefits of such outlays would be relieved. So, a schedule, fixing several charges, each ship subject to one or more as the case may be, but in the aggregate not in excess of the reasonable expense of the service to such ship, seems clearly just.

Does the Constitution of the United States forbid such charges or fees?

The decisions of the Supreme Court of the United States are and must be controlling on the question.

In numerous decisions "duty of tonnage" has been considered and defined. We have considered these cases with care in the light of the facts presented therein.

In many cases the general proposition is stated that all levies by the State, or its authority, for the privilege of entering a harbor, the exercise of the free right of navigation upon navigable waters, are forbidden, being within the evils aimed at by the Consti-

tution. This is true whether such tax is imposed strictly on a basis of tonnage or otherwise.

Navigation is a part of commerce, and a tax burden imposed on the one is a burden on the other.

Duty of tonnage is forbidden likewise as to vessels navigating the waters of a State, even ships engaged in intra- state commerce. - **Steamship Company v. Portwardens,** 6 Wallace 31; **State Tonnage Tax Cases,** 12 Wallace 204; **Peete v. Horgan,** 19 Wallace 581; **Cannon v. New Orleans,** 20 Wallace 577; **Inman Steamship Co. v. Tinker,** 94 U. S. 238; **Transportation Company v. Parkersburg,** 107 U. S. 691; **Gibbons v Ogden,** 9 Wheaton 1, 201-3.

On the other hand, fees or charges imposed under State laws for wharfage, pilot service, and quarantine purposes, as compensation for the service, when rendered by private agencies, or to cover the expense of providing such service by state or minicipal authority, are not duties on tonnage. - **Cooley v. Board of Wardens, etc.,** 12 Howard 288, 312, 314; **Packet Company v. Keokuk,** 95 U. S. 80; **Vicksburg v. Tobin,** 100 U.S. 430; **Packet Company v. St. Louis,** 100 U. S. 423; **Transportation Company v. Parkersburg, supra; Packet Company v. Catlettsburg,** 105 U. S. 559; **Morgan's Steamship Company v. Louisiana Board of Health, et al,** 118 U. S. 455; **Huse v. Glover,** 199 U. . 543.

In several of these cases the court discusses the principles underlying the distinction between tonnage taxes and fees and charges for services or facilities in aid of navigation and commerce.

In **Cooley v. Board of Wardens, etc., supra,** speaking

of these provisions of the Federal Constitution, it was said:

"This provision of the Constitution was intended to operate upon subjects actually existing and well understood when the Constitution was formed. Imposts and duties on imports, exports, and tonnage were then known to the commerce of a civilized world to be as distinct from fees and charges for pilotage, and from the penalties by which commercial States enforced their pilot-laws, as they were from charges for wharfage or towage, or any other local port-charges for services rendered to vessels or cargoes; and to declare that such pilot-fees or penalties, are embraced within the words imposts or duties on imports, exports, or tonnage, would be to confound things essentially different, and which must have been known to be actually different by those who used this language." - 12 Howard, 299 (314).

In that case pilot fees, imposed whether a pilot was used or not, were sustained on the ground of the propriety of maintaining a pilot-service for protection against dangers of navigation in the absence of such service. The income from fees, where no pilot was used, went to a pilots' widows' and orphans' fund.

This ruling has been often re-affirmed.

Speaking of harbor regulations in **Inman Steamship Company v. Tinker, supra,** it was said:

"Similar provisions, varying according to local circumstances, exist at all important points throughout the world wither marine commerce finds its way. They are indispensable to those engaged in that business. They fence out many evils, and promote largely the convenience and the welfare of those engaged in this field of enterprise. Perhaps it is hardly too strong language to say, they are well nigh vital to

commerce itself. It may be conceded, also, that foreign steamships and other vessels visiting the ports of a State for business purposes may be made liable by the laws of such State for all reasonable and proper port charges. This is but a fair return for the benefits received." - 94 U. S. 238 (244).

In that case the charge was imposed strictly on the basis of the registered tonnage of the vessel. From a reading of the facts, in connection with the opinion, it appears the court deemed the levy oppresive, and without relation to the service rendered. It was held void because a tonnage tax, citing earlier cases. The opinion proceeds:

"The tax imposed is not merely a mode of measuring the compensation to be paid. The answer to this suggestion is, that it is exacted where there is nothing to be paid for, and has no reference to any circumstance in this connection but the tonnage of the vessel and the class to which it belongs." - 94 U. S. 245.

Reviewing these cases in **Morgan's Steamship Company v. Louisiana Board of Health, et al, supra,** it was said:

"But in all these cases the contribution exacted was measured by the tonnage of the vessel in express terms; and the decision of the court rested on that fact."—118 U. S. 462-463.

In **Packet Company v. Catlettsburg, supra,** regulalations imposing wharfage fees at a municipal wharf, and requiring vessels to land at that wharf were sustained as proper and necessary in the particular case for the safety and convenience of ships and other pertinent interests.

In **Huse v. Glover, supra,** the State of Illinois in-

stalled and operated locks in the Illinois River, charging tolls for the use of the locks, to cover such outlays. These tolls were upheld against an insistence that they were tonnage taxes. Speaking of the ordinance of 1787, providing that the navigable waters in such territory should be free and "without any tax, impost, or duty," the court said:

"The exaction of tolls for passage through the locks is as compensation for the use of artificial facilities the stream. The provision of the clause that the navi- constructed, not as an impost upon the navigation of gable streams should be highways without any tax, impost, or duty, has reference to their navigation in their natural state. It did not contemplate that such navigation might not be improved by artificial means, by the removal of obstructions, or by the making of dams for deepening the waters, or by turning into the rivers waters from other streams to increase their depth. For outlays caused by such works the State may exact reasonable tolls. They are like charges for the use of wharves and docks constructed to facilitate the landing of persons and freight, and the taking them on board, or for the repair of vessels."—119 U. S. 548.

Speaking of tonnage duties, it was further said:

"A duty of tonnage within the meaning of the Constitution is a charge upon a vessel, according to its tonnage, as an instrument of commerce, for entering or leaving a port, or navigating the public waters of the country; and the prohibition was designed to prevent the States from imposing hindrances of this kind to commerce carried on by vessels."—119 U. S. 549-550.

In **Packet Company v. St. Louis, supra,** the court reviewed the various duties imposed on the harbor-master of St. Louis, and said:

"The duties thus imposed upon the harbor-master, if faithfully discharged, must, it will be conceded, materially advance, and not obstruct or burden trade and business on the Mississippi River, especially at the port of St. Louis. Services rendered by him in the execution of those duties would be in aid, and not a hindrance, of commerce and navigation."—100 U. S. 427.

The authority and duty of the State to make proper harbor regulations suited to local conditions, and to actively supervise or operate the harbor in accordance with such regulations, in the absence of action by Congress, are now fully settled; that this must entail expense is obvious; that such service is not a hindrance to but in aid of shipping, is clear.

The question, then, resolves itself into the simple inquiry: Does the Constitution of the United States contemplate that such service shall be rendered at the expense of the taxpayers, or covered by some special fee not applicable to all ships which share the benefits of the service? We think not.

It is not questioned that the fees sued for were for the use of the harbor by appellant's ships in the conduct of the shipping business, that they had the benefit of the services outlined above, that the charges were reasonable for the service named in the order of the commission. Probably the insistence of appellant is that no charge can be made for such service.

In our opinion, the true test, under the decisions as we read them, is: Are the harbor fees a burden and hindrance to navigation and commerce, or are they a just return for the reasonable expense incurred in rendering a service facilitating navigation? Would

shipping be better off without such service and no charge or with such service and such charge?

Thus viewing the case, we hold the fees in suit are lawful charges for such service.

Affirmed.

Anderson, C. J., Gardner and Foster, JJ. concur.

Reported in 229 Ala. 624.

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SUPREME COURT OF THE UNITED STATES.

No. 43.—October Term, 1935.

Clyde Mallory Lines, Appellant,
vs.
The State of Alabama, ex rel. State Docks Commission.

On Appeal from the Supreme Court of Alabama.

[December 9, 1935.]

Mr. Justice Stone delivered the opinion of the Court.

This case is here on appeal under § 237 (a) of the Judicial Code, 28 U. S. C. 344 (a), from a judgment of the Supreme Court of Alabama, 229 Ala. 624, which affirmed a money judgment of the Circuit Court of Mobile County for the recovery of "harbor fees" from appellant.

Appellee, the State Dock Commission, is a state agency authorized to conduct "the operation of all harbors and seaports within the state" and to "adopt rules not inconsistent with the provisions of this Act for the purpose of regulating, controlling and conducting the said operation" and with power "to fix from time to time reasonable rates of charges for all services and for the use of all improvements and facilities provided under the authority of this Act." No. 303, Alabama Acts of 1923, 330; No. 303, Ala. Acts of 1927, 1, 8, 12, 13.

By resolution of March 5, 1924, appellee adopted rules and regulations for the Port of Mobile, for the control, under the direction of a "chief wharfinger" or harbor master, of the movement, disposition and anchorage of vessels passing in and out of and using the port. By resolution of February 11, 1928, these rules were readopted and a new rule was added prohibiting the discharge of fuel oil into the harbor by vessels and manufacturing plants. The rules also established a schedule of "harbor fees," for mooring and shifting vessels in the harbor, and for all vessels of specified classes entering the harbor, including a fee of $7.50 for vessels "500 tons and over." Appellants operate vessels of more than 500 tons in the coastwise trade between New York and Mobile, and the present suit was brought by appellee to recover fees incurred by reason of the call of appellant's vessels at Mobile.

The authority of appellee, under the laws and constitution of the state, to adopt the harbor rules and schedule of fees is not questioned, and the reasonableness of the $7.50 fee is conceded. But appellant insists that its imposition is prohibited by Art. I, § 10, Clause 3 of the Constitution, which provides that "no state shall, without the consent of Congress, lay any duty of tonnage," and that it is a burden on interstate commerce forbidden by the commerce clause.

The Supreme Court of Alabama found that the contested fee was a charge made for the policing of the harbor under the rules adopted by the appellee to insure the safety of vessels and the dispatch of shipping within the port, by regulating the speed of vessels, their movement and anchorage, and by providing for their protection from danger of fire occasioned by the uncontrolled discharge of oil into the harbor.

The record amply supports this conclusion. Appellee's resolution adopting the harbor fees declared that they were "for the purpose of meeting the expense attendant upon the supervision of the port and the execution of the regulations and providing for the proper accommodation of vessels at this port." The rules are plainly devised to insure the safety of vessels and to facilitate their use of the harbor. They regulate, within the harbor, the disposition of the rigging of sailing ships, the speed and mooring of vessels, the selection and change of their anchorage, their loading and unloading, and the use of lighters, barges and rafts. They require the arrival of all vessels at the port to be reported to the chief wharfinger, and charge him with "responsibility for selecting and changing anchorages of and for the movements of vessels into and out of slips or berths, and with all other ship movements that effect a fair joint use of the facilities of the port." The evidence shows that ship movements within the port are carried on under his active supervision and control.

The $7.50 fee is conceded not to be a charge for the use of the state docks or for mooring and shifting vessels, for which specific charges are levied. It is the only fee attributable to the general service rendered by the Commission in securing the benefits and protection of the rules to shipping in the harbor. We accept the conclusion of the state court that it is charged for a policing service rendered by the state in the aid of the safe and efficient

use of its port, and we address ourselves to the question whether such a fee is forbidden by the Constitution either because it is a "duty of tonnage" or an unwarranted burden on interstate commerce.

1. It seems clear that the prohibition against the imposition of any duty of tonnage was due to the desire of the framers to supplement Art. I, § 10, Clause 2, denying to the states power to lay duties on imports or exports, see *Steamship Co.* v. *Portwardens*, 6 Wall. 31, 35; *Packet Co.* v. *Keokuk*, 95 U. S. 80, 87, 88, by forbidding a corresponding tax on the privilege of access by vessels to the ports of a state, and to their doubts whether the commerce clause would accomplish that purpose.[1] If the states had been left free to tax the privilege of access by vessels to their harbors the prohibition against duties on imports and exports could have been nullified by taxing the vessels transporting the merchandise. At the time of the adoption of the Constitution "tonnage" was a well understood commercial term signifying in America the internal cubic capacity of a vessel. See *Inman Steamship Co.* v. *Tinker*, 94 U. S. 238, 243. And duties of tonnage and duties on imports were known to commerce as levies upon the privilege of access by vessels or goods to the ports or to the territorial limits of a state and were distinct from fees or charges by authority of a state for services facilitating commerce, such as pilotage, towage, charges for loading and unloading cargoes, wharfage, storage and the like. See *Cooley* v. *Board of Wardens*, 12 How. 299, 314; *Inman Steamship Co.* v. *Tinker*, *supra*, 243.

Hence the prohibition against tonnage duties has been deemed to embrace all taxes and duties regardless of their name or form, and even though not measured by the tonnage of the vessel, which operate to impose a charge for the privilege of entering, trading in, or lying in a port, *Steamship Co.* v. *Portwardens*, *supra*; *State Tonnage Tax Cases*, 12 Wall. 204; *Cannon* v. *New Orleans*, 20 Wall.

[1] The adoption of the duty of tonnage clause followed a motion of Maryland delegates that "No state shall be restricted from laying duties of tonnage for the purpose of clearing harbors and erecting light houses." Despite the assertion that such works were peculiarly necessary in the Chesapeake, the convention proved hostile to state tonnage levies. There was uncertainty whether the commerce clause would forbid such duties: Gouverneur Morris said that it would not, Madison thought that it should, Sherman argued for a concurrent power over commerce with power in the United States to control state regulations. Whereupon the clause was added in its present form. See Madison's Notes of the Convention (for Sept. 15, 1787).

577; *Inman Steamship Co.* v. *Tinker, supra;* and see *Huse* v. *Glover*, 119 U. S. 543, 549, 550. But it does not extend to charges made by state authority, even though graduated according to tonnage, for services rendered to and enjoyed by the vessel, such as pilotage, *Cooley* v. *Board of Wardens, supra,* or wharfage, *Packet Co.* v. *Keokuk, supra; Packet Co.* v. *St. Louis*, 100 U. S. [illegible]; *Packet Co.* v. *Cattlettsburg*, 105 U. S. 559; *Transportation Co.* v. *Parkersburg*, 107 U. S. 691; *Ouachita River Packet Co.* v. *Aiken*, 121 U. S. 444; or charges for the use of locks on a navigable river, *Huse* v. *Glover, supra,* or fees for medical inspection, ~~*Morgan* v. *Louisiana*~~, 118 U. S. 455. Morgan's Steamship Co. v. Board of Health,

Appellant places its reliance on those cases in which a tax, levied in the guise of wharfage or a charge for medical inspection, was condemned because imposed on all vessels entering a port, whether receiving the benefit of the service or not, see *Steamship Co.* v. *Portwardens, supra; Cannon* v. *New Orleans, supra; Pete* v. *Morgan*, 19 Wall. 581. It argues that the present fees must similarly be condemned because imposed on all vessels entering the port, and points out that appellant has neither asked nor received any police service such as that which the state court regarded as the basis for the charge.

But the policing of a harbor so as to insure the safety and facility of movement of vessels using it differs from wharfage or other services which benefit only the particular vessels using them. It is not any the less a service beneficial to appellant because its vessels have not been given any special assistance. The benefits which flow from the enforcement of regulations, such as the present, to protect and facilitate traffic in a busy harbor inure to all who enter it. Upon this ground, among others, a fee for half pilotage imposed upon vessels such as were not required to take a pilot was upheld in *Cooley* v. *Board of Wardens, supra*, 312, 313. We conclude that a reasonable charge for a service such as the present is neither within the historic meaning of the phrase "duty of tonnage" nor the purpose of the constitutional prohibition.

It is unnecessary to consider other types of port charges, as for dredging or other forms of harbor improvement, with respect to which different considerations may apply.

2. The present fee to defray the cost of a purely local regulation of harbor traffic is not an objectionable burden on commerce. State

regulations of harbor traffic, although they incidentally affect commerce, interstate or foreign, are of local concern. So long as they do not impede the free flow of commerce and are not made the subject of regulation by Congress they are not forbidden. *Willson* v. *Black Bird Creek Marsh Co.*, 2 Pet. 245; *Gibbons* v. *Ogden*, 9 Wheat. 1, 209; *Cooley* v. *Board of Wardens, supra*, 314; *Gilman* v. *Philadelphia*, 3 Wall. 713; *Pound* v. *Turck*, 95 U. S. 459; *Escanaba Co.* v. *Chicago*, 107 U. S. 678; *Cardwell* v. *American Bridge Co.*, 113 U. S. 205; *Willamette Bridge Co.* v. *Hatch*, 125 U. S. 1; *Lake Shore & Michigan Southern R. R.* v. *Ohio*, 165 U. S. 365; *Cummings* v. *Chicago*, 188 U. S. 410; *Manigault* v. *Springer*, 199 U. S. 473; see *Brown* v. *Houston*, 114 U. S. 622, 631; *Minnesota Rate Cases*, 230 U. S. 352, 363, 407. And charges levied by state authority to defray the cost of regulation or of facilities afforded in aid of interstate or foreign commerce have consistently been held to be permissible. Such charges were considered and upheld in *Packet Co.* v. *Keokuk, supra*; ~~*Morgan v. Louisiana*~~, *supra*; *Transportation Co.* v. *Parkersburg, supra*, 701, *et seq.*; *Ouachita Packet Co.* v. *Aiken, supra*, 448, *et seq.*; *Huse* v. *Glover, supra*. See *Sands* v. *Manistee River Improvement Co.*, 123 U. S. 288. A similar exercise of state power is the imposition of inspection or license fees incident to or in support of local regulations of interstate commerce. *Patapsco Guano Co.* v. ~~*United States*~~, 171 U. S. 345; *McLean* v. *Denver & Rio Grande R. R. Co.*, 203 U. S. 38, 54; *Red "C" Oil Mfg. Co.* v. *Board of Agriculture*, 222 U. S. 380; *Savage* v. *Jones*, 225 U. S. 501; *Merchants Exchange* v. *Missouri*, 248 U. S. 365; *Pure Oil Co.* v. *Minnesota*, 248 U. S. 158. Its most recent manifestation is the levy of a tax which represents a reasonable charge upon interstate automobile traffic passing over state highways, upheld in *Kane* v. *New Jersey*, 242 U. S. 160; *Clark* v. *Poor*, 274 U. S. 554; *Interstate Busses Corporation* v. *Blodgett*, 276 U. S. 245; *Hendrick* v. *Maryland*, 235 U. S. 610.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.